No. 02-42-CSX Title: Franchise Tax Board of California, Petitioner
v.
Gilbert P. Hyatt, et al.

Docketed: July 8, 2002 Court: Supreme Court of Nevada

Entry	Date	Proceedings and Orders
	Jul 2 2002	Petition for writ of certiorari filed. (Response due September 6, 2002)
	Jul 18 2002	Order extending time to file response to petition until September 6, 2002.
	Sep 6 2002	Brief of respondent Gilbert P. Hyatt in opposition filed.
	Sep 6 2002	Brief amici curiae of Oregon, et al. filed.
	Sep 6 2002	Brief amicus curiae of Multistate Tax Commission filed.
	Sep 17 2002	Reply brief of petitioner Franchise Tax Board of California filed.
	Sep 18 2002	DISTRIBUTED for Conference of October 11, 2002
	Oct 15 2002	Petition GRANTED. SET FOR ARGUMENT February 24, 2003. **********
	Nov 6 2002	Order extending time to file petitioner's brief on the merits to and including December 9, 2002.
	Dec 9 2002	Brief amicus curiae of Multistate Tax Commission filed.
	Dec 9 2002	Brief amici curiae of National Governors Association, et al. filed.
	Dec 9 2002	Joint appendix filed.
	Dec 9 2002	Brief of petitioner Franchise Tax Board of the State of California filed.
	Dec 9 2002	Brief amici curiae of Florida, et al. filed.
	Dec 13 2002	Order extending time to file brief of respondent on the merits until January 21, 2003.
	Dec 20 2002	Motion of Florida, et al. for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Dec 30 2002	Respondents' response to motion of amici curiae Florida, et al., for leave to participate in oral argument as amici curiae and for divided argument.
	Jan 10 2003	Record filed.
	Jan 10 2003	CIRCULATED.
	Jan 14 2003	Petitioner's response to motion of Florida, et al. for leave to participate in oral argument as amici curiae and for divided argument.
	Jan 15 2003	Brief amicus curiae of Pacific Legal Foundation filed.
	Jan 21 2003	Brief of respondent Gilbert P. Hyatt filed.
	Jan 27 2003	Motion of Florida, et al. for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
	Feb 14 2003	Reply brief of petitioner California Franchise Tax Board filed.
	Feb 24 2003	ARGUED.

Supreme Court, U.S.
FILED

No. 02 - 42 JUL - 2 2002

OFFICE OF THE CLERK

In The
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT AND EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A long-time resident of California sued that State in a Nevada state court, alleging that California committed the torts of invasion of privacy, outrage, abuse of process, and fraud in the course of a personal income tax investigation concerning the timing of the individual's change of residence from California to Nevada. California Government Code section 860.2 reads: "Neither a public entity nor a public employee is liable for an injury caused by . . . (a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax."

In *Nevada v. Hall*, 440 U.S. 410 (1979) this Court ruled that, in a tort action against Nevada arising out of a traffic accident occurring in California, California need not give full faith and credit to Nevada's statutory limitation on liability for injuries caused by Nevada state employees. However, the Court also noted that its ruling was fact-based: "California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities." 440 U.S. at 424 n.24. The question presented is:

Did the Nevada Supreme Court impermissibly interfere with California's capacity to fulfill its sovereign responsibilities, in derogation of article IV, section 1, by refusing to give full faith and credit to California Government Code section 860.2, in a suit brought against California for the torts of invasion of privacy, outrage, abuse of process, and fraud alleged to have occurred in the course of California's administrative efforts to determine a former resident's liability for California personal income tax?

LIST OF PARTIES

Petitioner Franchise Tax Board of the State of California

Respondent Gilbert P. Hyatt

Respondent Eighth Judicial District Court of the State of Nevada, in and for the County of Clark

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OPINIONS BELOW

The written decision of the Nevada Supreme Court in Case Numbers 35549 and 36390, dated April 4, 2002 (Order Granting Petition for Rehearing, Vacating Previous Order, Granting Petition for a Writ of Mandamus in Part in Docket No. 36390, and Granting Petition for Writ of Prohibition in Part in Docket No. 35549), is printed in the Appendix, *infra*, at pp. 5-18. The written decision of the Nevada Supreme Court in Case Numbers 35549 and 36390, dated June 13, 2001 (Order Granting Petition (Docket No. 36390) and Dismissing Petition (Docket No. 35549)) is printed in the Appendix, *infra*, at pp. 38-44. The written decision of the Nevada Supreme Court in Case Numbers 39274 and 39312, dated April 4, 2002 (Order Denying Petition for a Writ of Mandamus or Prohibition and Dismissing Appeal), pertaining to the protective order, is printed in the Appendix, *infra*, at pp. 19-21. The Protective Order of the Eighth District Court of the State of Nevada Protective Order is printed in the Appendix, *infra*, at pp. 22-35.

JURISDICTION

On April 4, 2002, the Nevada Supreme Court issued its orders (1) denying and granting in part Petitioner's Petitions For Writ of Mandamus and Writ of Prohibition, and (2) denying Petitioner's Petition For Writ of Mandamus and Writ of Prohibition pertaining to the protective order. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a) because the Nevada Supreme Court rejected

California's claim of right under Article IV, Section 1, of the Constitution, the "Full Faith and Credit Clause."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(Set forth verbatim in Appendix, *infra*, pp. 45-48.)

United States Constitution, Art. IV, § 1, The Full Faith and Credit Clause.

California Government Code § 860.2

California Government Code § 905.2

California Government Code § 911.2

California Government Code § 945.4

California Revenue and Taxation Code § 19041

California Revenue and Taxation Code § 21021

STATEMENT OF THE CASE

Pursuant to its inherent sovereign powers, the State of California imposes a personal income tax upon the income of its residents. The Petitioner is the Franchise Tax Board of the State of California (hereinafter referred to as "FTB"). The FTB is the California state agency charged with the public duty of implementing and enforcing the California state personal income tax.

Respondent Gilbert P. Hyatt is a former long-time resident of the State of California who filed a return for 1991 with FTB asserting that he had terminated his California residency and moved to Nevada on September

26, 1991 just before certain companies paid him $40 million cash in "patent licensing fees" for a patent he had obtained while a resident of California. Hyatt did not report the $40 million as California income subject to the state personal income tax. The FTB conducted an audit investigation of his filing status and issued Notices of Proposed Assessment for the years 1991 and 1992 based upon its determination that Hyatt remained a California resident until April of 1992. In these Notices of Proposed Assessment the FTB also asserted a civil fraud penalty. Hyatt filed a protest[1] of these Notices of Proposed Assessment. That protest is still pending in California. After filing his protest, Hyatt filed a lawsuit for monetary damages against FTB in Respondent Nevada state court alleging the commission of fraud, abuse of process, invasion of privacy, outrage and negligence by the FTB in both California and Nevada. (Amended Complaint for Declaratory Relief and Tort Damages is printed in the Appendix, *infra*, at pp. 49-90)

The amended complaint sought declaratory relief that Hyatt was a Nevada resident and not subject to California personal income tax. In his action, Hyatt is seeking hundreds of millions of dollars in damages based upon allegations of the common law torts of: 1) unreasonable intrusion upon the seclusion of another; 2) unreasonable publicity given to private facts; 3) casting plaintiff in a false light; 4) outrage; 5) abuse of process; 6) fraud; and 7) negligent misrepresentation.

[1] A "protest" triggers an internal administrative review of the proposed assessments conducted by a hearing officer who is an employee of the FTB. Cal. Rev. & Tax Code § 19041. The hearing officer on the Hyatt protest is an attorney.

The request for declaratory relief was dismissed by Nevada state court on FTB's motion for judgment on the pleadings for lack of subject matter jurisdiction. But Hyatt was allowed to proceed with his tort claims. The Nevada courts also imposed a Protective Order that directs the FTB not to share information it acquired during the course of the lawsuit with the FTB employees conducting the ongoing administrative proceeding involving Hyatt's personal income tax obligations without first requesting Hyatt's permission to make the documents available. If Hyatt refuses permission, the Protective Order directs the FTB to attempt to obtain the documents through the administrative process. (Protective Order is printed in the Appendix, *infra*, at pp. 22-35) In addition, the Nevada district court ordered the FTB to produce certain documents that, under California evidentiary and administrative law, would be barred or precluded from disclosure. FTB filed its first writ petition with the Nevada Supreme Court in Case Number 35549 contesting these discovery orders.

While that first writ was pending before the Nevada Supreme Court, FTB filed a motion in the trial court seeking summary judgment on the remaining tort claims and dismissal for lack of jurisdiction. That motion was denied by the trial court, and FTB filed a second writ petition in the Nevada Supreme Court, Case Number 36390. On June 13, 2001, the Nevada Supreme Court granted that second writ petition, finding that Hyatt "failed to show any evidence of tortious conduct on the part of the Franchise Tax Board." The Nevada Supreme Court ordered the trial court to enter summary judgment in favor of FTB and dismissed the first writ petition as being moot.

After the Nevada Supreme Court entered its order granting the second writ petition, the FTB filed a motion with the trial court to vacate the Protective Order. That Protective Order had effectively served to prevent the FTB from sharing information it had acquired during the lawsuit with the administrative audit review that California was still conducting to determine whether Hyatt owed additional taxes and should be subjected to a civil fraud penalty for 1991 and 1992. This motion to vacate was denied, and another petition for writ and appeal was filed by the FTB with the Nevada Supreme Court on March 4, 2002.

On April 4, 2002, pursuant to Hyatt's petition for reconsideration, the Nevada Supreme Court issued two separate orders in this case. First, with certain exceptions, the court denied FTB's petitions for writ of mandamus and prohibition. With respect to the mandamus petition, the court refused to grant full faith and credit to California's immunity laws as barring Hyatt's Nevada suits based on the common-law intentional torts; however, the court did make allowance for California's statutory immunity for *negligent* acts, on the ground that such an allowance would not contravene any Nevada interests. With respect to the prohibition petition, the court generally ordered the disclosure and release of documents that are considered confidential and not subject to disclosure under California law; however, the court did bar the district court from requiring the FTB to release one particular document. (Appendix, *infra*, at pp. 3-4) Second, the court denied the FTB's petition for writ of mandamus or prohibition challenging the

district court's denial of the FTB's motion to vacate a protective discovery order.[2] (Appendix, *infra*, at pp. 19-21.)

REASONS FOR GRANTING THE WRIT

I. NEVADA'S REFUSAL TO EXTEND FULL FAITH AND CREDIT TO CALIFORNIA'S TAX IMMUNITY LAW CRIPPLES CALIFORNIA'S ABILITY TO PERFORM ONE OF ITS CORE SOVEREIGN FUNCTIONS, IN THIS CASE ENFORCEMENT OF CALIFORNIA'S PERSONAL INCOME TAX LAW.

California taxes all of the income of its residents, whether earned within or outside California. In addition, it taxes the income received from California sources of non-residents. As part of its tax-enforcement procedures, a core sovereign function, FTB conducts "residency audits" of former California residents now living in other States, for the purpose of determining the existence and extent of any tax obligation owing for the period of California residency and to determine whether they had California source income. Residency audits necessarily involve official tax enforcement activities both within California and in other States.

Under California law, there are multiple jurisdictional bars to bringing a lawsuit based on an ongoing administrative tax investigation, such as a residency tax audit, yet the Nevada Supreme Court refused to extend full faith and credit to California's immunity laws. It is important

[2] The order also dismissed the FTB's appeal from the same order.

that this Court grant the writ in this case to protect California's – or indeed any State's – ability to undertake the exercise of a core sovereign function without exposing it to potentially *unlimited* tort liability to *private parties* in the courts of *sister States*. California has found it necessary to enact a broad immunity scheme, with no geographical restriction on its application, to protect its sovereign tax administration activities. In order to protect the balance inherent in our Constitution's federal system, it is important that this Court protect California's efforts by affirming that full faith and credit applies in such circumstances.

In *Nevada v. Hall*, 440 U.S. 410, 424 n.24, *reh'g denied*, 441 U.S. 917 (1979), this Court anticipated that there could be circumstances where even differing state policies would not justify denying full faith and credit to a sister State's body of law. It was suggested that such circumstances might arise where the refusal to extend full faith and credit poses a "substantial threat to our constitutional system of cooperative federalism[,]" such as where it interferes with a State's "capacity to fulfill its own sovereign responsibilities." 440 U.S. at 424 n.24. This Court explained that *Nevada v. Hall* was not such a case. The FTB believes, however, that this case is precisely what was anticipated by footnote 24.

Because the FTB's alleged torts in this case arose within the context of an administrative tax investigation, California Government Code § 860.2 specifically immunizes the FTB from Hyatt's claims:

> "Neither a public entity nor a public employee is liable for an injury caused by:

"(a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax.

"(b) An act or omission in the interpretation or application of any law relating to a tax."

California case law dealing with § 860.2 has given it a broad interpretation. For example, *Mitchell v. Franchise Tax Board*, 183 Cal.App.3d 1133, 1136, 228 Cal.Rptr. 750, 753 (1986), dismissed negligence, slander of title, interference with credit relations, and due process claims against the FTB based on § 860.2.[3]

As footnote 24 of *Nevada v. Hall* contemplated, it is vital to protect the States' ability to carry out their core sovereign functions, protected by their immunity laws, without the risk of having to defend themselves in the courts of sister States. Full faith and credit must require the Nevada courts to apply California's governmental immunity laws regarding tax administration to the entirety of FTB's conduct, including its conduct in Nevada. Here, Hyatt, a long-time California resident now allegedly living in Nevada, was the subject of a California residency audit. He has sued California in a Nevada state court under Nevada law alleging invasion of privacy, fraud, and

[3] However, section 860.2 does not exist in a vacuum, but is part of a larger statutory scheme for dealing with claims that misconduct of some variety occurred during a tax investigation or proceeding. For example, California Revenue and Taxation Code § 21021 provides taxpayers with a cause of action whenever the tax agency fails to follow board published procedures. On the other hand, California's Tort Claims Act, Gov't Code §§ 911.2, 905.2, and 945.4, bars lawsuits for monetary damages against California or a state employee without first complying with the claims presentation requirements.

abuse of process during the residency audit. However, rather than applying California law, the Nevada Supreme Court has ruled that Hyatt may prosecute his claims against California in Nevada state courts for alleged tortious conduct that comprises the FTB's administrative audit activities notwithstanding California's immunity provisions against suit for tax enforcement activities. Thus, California was deprived in this case of reasonable reliance on an immunity statute that was specifically enacted to protect the core sovereign function of state tax enforcement. Refusal to apply California law here severely hampers California's ability to undertake this core sovereign function. More importantly, the widespread application of the rule set down by the Nevada Supreme Court could cripple the States' ability to conduct vital state programs and protect vital state interests that are necessary to enable them to carry out core state functions.

There should be no doubt in this case that FTB was carrying out core sovereign functions. "'[T]axes are the life-blood of government. . . .'" *Franchise Tax Board of California v. USPS*, 467 U.S. 512, 523 (1984), quoting *Bull v. United States*, 295 U.S. 247, 259 (1935). In another context, involving congressional limitation of federal court jurisdiction, this Court has recognized "'the imperative need of a State to administer its own fiscal operations'" and the congressional intent to limit interference with "'so important a local concern as the collection of taxes.'" *Franchise Tax Board of Cal. v. Alcan Aluminium*, 493 U.S. 331, 338 (1990). The determination of residency is a foundational step in the collection of state personal income taxes. The FTB's acts were all performed as a part of the determination of residency, and thus were undertaken as

part of the State of California's inherent sovereign power to assess and collect taxes.

Allowing Hyatt to proceed notwithstanding the existence of California laws barring his action would seriously interfere with California's capacity to fulfill its sovereign responsibilities. California has the sovereign responsibility to administer California's tax laws. Hyatt's case seeks to punish the FTB for making minimal disclosure to others of identifying information about Hyatt for the purpose of determining his residency under these laws. Allowing Hyatt to litigate these acts further without applying California law would impede the FTB's entire residency audit program, as making even minimal inquiries and information disclosures out of state would expose the FTB to the threat of protracted, out-of-state tort litigation about its residency audit processes. This would necessarily interfere with the FTB's ability to administer California's tax laws, since consulting third party sources and making minimal information disclosures out of state are often required to investigate change of residency claims.

In addition, allowing Hyatt's case to proceed also exposes California to additional legal expenses and the threat of punishment for trying to obtain relevant information during residency audits. The FTB has incurred substantial additional litigation expenses before it has even finalized its proposed tax assessment against Hyatt. The FTB's administrative process could result in modification or withdrawal of the FTB's proposed assessments, yet the FTB already has been called to justify in Nevada courts virtually all of its audit actions and conclusions as if the final administrative result were set in stone. This is a subversion of California's tax administrative process.

Nevada's refusal to apply California's governmental immunity laws to Hyatt' s case, which arises entirely from acts incident to California tax administration, violates the Full Faith and Credit Clause of the United States Constitution.

II. AS SHOWN BY THE ORDER OF THE NEVADA SUPREME COURT IN THIS CASE, AND CONTRASTING RESULTS IN OTHER STATES, THE STATES REQUIRE GUIDANCE IN THE INTERPRETATION AND APPLICATION OF THE FULL FAITH AND CREDIT ANALYSIS OF *NEVADA V. HALL*.

In *Nevada v. Hall*, a University of Nevada employee driving a State of Nevada car in California negligently caused an accident resulting in severe physical injury to California residents. At the time, Nevada law limited tort recoveries against the State of Nevada to $25,000. The California courts declined to apply this limitation on Nevada's statutory waiver of its immunity from suit. *Nevada v. Hall*, 440 U.S. at 412-413. This Court affirmed, holding that the Full Faith and Credit Clause did not require California to apply Nevada's immunity laws to the California car accident. *Nevada v. Hall*, 440 U.S. at 424. The Court noted that California had an interest in providing full protection to those injured on its highways, and that requiring California to limit recovery based on Nevada law would have been obnoxious to California's policy of full recovery. *Ibid*. As noted above, however, the Court also stated that a different analysis might apply where one State's exercise of jurisdiction over a sister State could "interfere with [the sister State's] capacity to fulfill its own sovereign responsibilities":

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion in this case, to consider whether different state policies, either of California or Nevada, might require different analysis or a different result. *Nevada v. Hall*, 440 U.S. at 424 n.24.

Numerous courts have recognized the *Nevada v. Hall* exception suggested in footnote 24, which the FTB asserts applies in this case. In fact, several state courts have applied it, and have dismissed lawsuits against sister States as a result. But in this case the Nevada courts did not believe that this suit was precluded by the exception anticipated in *Nevada v. Hall.*

For example, in *Guarini v. State of N.Y.*, 521 A.2d 1362 (N.J. Super. 1986), *aff'd*, 521 A.2d 1294, *cert. denied*, 484 U.S. 817 (1987), New Jersey claimed that the Statue of Liberty and the island on which it is located were under its jurisdiction and sovereignty. New York had exercised jurisdiction over the statue and the island for at least 150 years. New Jersey sued the State of New York in a New Jersey Court, but the New Jersey court dismissed the case under the exception to *Nevada v. Hall. Id.* at 1366-67. The *Guarini* court held that the "ruling [in *Nevada v. Hall*] did not mean that a State could be sued in another as a matter of course," *id.* at 1366, and dismissed the action based on its threat to the constitutional system of cooperative federalism, including a potential "cascade of lawsuits" by one State's citizens against neighboring States:

> The present case requires a 'different analysis' and a 'different result.'. . . Plaintiff, if successful, would clearly interfere with New York's capacity to fulfill its own sovereign responsibility over those two islands in accordance with and as granted by the 1833 compact. Exercise of jurisdiction by this court would thereby pose a 'substantial threat to our constitutional system of cooperative federalism.' *Id.*

Xiomara Mejia-Cabral v. Eagleton School, 97-2715 (1999 Mass. Super. Lexis 353, September 15, 1999), involved another application of the *Nevada v. Hall* footnote 24 exception. The plaintiff sued a Massachusetts school in a Massachusetts state court for wrongful death caused by a juvenile delinquent attendee. The State of Connecticut was also joined as a third-party defendant under allegations that it was negligent in placing the juvenile at the school. The Massachusetts court contrasted *Nevada v. Hall* and dismissed the State of Connecticut as a defendant, noting that:

> The prospect of one state's court deciding whether another state was negligent in selecting a particular rehabilitation program for a juvenile offender is profoundly troubling and this court's assertion of jurisdiction over such a claim against the state of Connecticut would pose a 'substantial threat to our constitutional system of cooperative federalism.' The State of Connecticut makes a compelling argument that this third-party complaint would, if allowed to proceed, 'interfere with [Connecticut's] capacity to fulfill its own sovereign obligations' and that recognition of its sovereign immunity is therefore mandatory. *Id.* (Internal citations omitted.)

The analyses, and indeed the results, in *Guarini* and *Xiomara Mejia-Cabral* are contrary to that of the Nevada Supreme Court in the present case. These contrasting views underscore the need to clarify the footnote 24 exception of *Nevada v. Hall*. In the final analysis, the Nevada Supreme Court's decision in this case is inconsistent with the interpretation and application of that decision by other States. Only this Court can speak authoritatively to the reach of its decision in *Nevada v. Hall*. Only this Court can fully resolve the proper application of the Full Faith and Credit Clause of the United States Constitution in the protection of the core sovereign functions of the several States.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE, Respondents, and GILBERT P. HYATT, Real Party in Interest.	No. 36390

WRIT OF MANDAMUS

TO: The Honorable Nancy M. Saitta, Judge of the Eighth Judicial District Court:

WHEREAS, this Court having made and filed its written decision that a writ of mandamus issue,

NOW, THEREFORE, you are directed to grant Franchise Tax Board's motion for summary judgment as to the negligence claim, in the case entitled Hyatt vs. Franchise Tax Board, Case No. A382999.

WITNESS The Honorables A. William Maupin, Chief Justice, Cliff Young, Miriam Shearing, Deborah A. Agosti, and Myron E. Leavitt, Associate Justices of the Supreme

Court of the State of Nevada, and attested by my hand and seal this 4th clay of April, 2002.

[SEAL] /s/ Bruce A. Herstmanshoff
Chief Assistant Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE, Respondents, and GILBERT P. HYATT, Real Party in Interest.	No. 35549

WRIT OF PROHIBITION

TO: The Honorable Nancy M. Saitta, Judge of the Eighth Judicial District Court:

WHEREAS, this Court having made and filed its written decision that a writ of prohibition issue,

NOW, THEREFORE, you are prohibited from requiring Franchise Tax Board to release document FTB No. 07381, in the case entitled Hyatt vs. Franchise Tax Board, Case No. A382999.

WITNESS The Honorables A. William Maupin, Chief Justice, Cliff Young, Miriam Shearing, Deborah A. Agosti, and Myron E. Leavitt, Associate Justices of the Supreme

Court of the State of Nevada, and attested by my hand and seal this 4th day of April, 2002.

[SEAL] /s/ Bruce A. Herstmanshoff
Chief Assistant Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE, Respondents, and GILBERT P. HYATT, Real Party in Interest.	No. 35549
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE, Respondents, and GILBERT P. HYATT Real Party in Interest.	No. 36390

ORDER, GRANTING PETITION FOR REHEARING, VACATING PREVIOUS ORDER, GRANTING PETITION FOR A WRIT OF MANDAMUS IN PART IN DOCKET NO. 36390, AND GRANTING PETITION FOR A WRIT OF PROHIBITION IN PART IN DOCKET NO. 35549

(Filed April 4, 2002)

In Docket No. 35549, Franchise Tax Board petitioned this court for a writ of mandamus or prohibition, challenging the district court's determination that certain documents were not protected by attorney-client work product or deliberative process privileges, and its order directing Franchise Tax Board to release the documents to Gilbert Hyatt. In Docket No. 36390, Franchise Tax Board separately petitioned this court for a writ of mandamus, challenging the district court's denial of its motions for summary judgment or dismissal, and contending that the district court lacks subject matter jurisdiction over the underlying tort claims because Franchise Tax Board is immune from liability under California law. Alternatively, Franchise Tax Board sought a writ of prohibition or mandamus limiting the scope of the underlying case to its Nevada-related conduct.

On June 13, 2001, we granted the petition in Docket No. 36390 on the basis that Hyatt did not produce sufficient facts to establish the existence of a genuine dispute justifying denial of the summary judgment motion. Because our decision rendered the petition in Docket No. 35549 moot, we dismissed it. Hyatt petitioned for rehearing in Docket No. 36390 on July 5, 2001, and in response to our July 13, 2001 order, Franchise Tax Board answered on August 7, 2001. Having considered the parties' documents and the entire record before us, we grant Hyatt's

petition for rehearing, vacate our June 13, 2001 order and issue this order in its place.

We conclude that the district court should have declined to exercise its jurisdiction over the underlying negligence claim under comity principles. Therefore, we grant the petition in Docket No. 36390 with respect to the negligence claim, and deny it with respect to the intentional tort claims. We also deny the alternative petition to limit the scope of trial. We further conclude that, except for document FTB No. 07381, which is protected by the attorney work-product privilege, the district court did not exceed its jurisdiction by ordering Franchise Tax Board to release the documents at issue because Franchise Tax Board has not demonstrated that they were privileged. Therefore, we grant the petition for a writ of prohibition[1] in Docket No. 35549 with respect to FTB No. 07381, and deny the petition with respect to all the other documents.

Background

The underlying tort action arises out of Franchise Tax Board's audit of Hyatt – a long-time California resident who moved to Clark County, Nevada – to determine whether Hyatt underpaid California state income taxes for 1991 and 1992. After the audit, Franchise Tax Board assessed substantial additional taxes and penalties against Hyatt. Hyatt formally protested the assessments in California through the state's administrative process, and sued Franchise Tax Board in Clark County District

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[1] Prohibition is a more appropriate remedy than mandamus for the prevention of improper discovery. *Wardleigh v. District Court*, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995).

Court for several intentional torts and one negligent act allegedly committed during the audit.

During discovery in the district court case, Hyatt sought the release of all the documents Franchise Tax Board had used in the audit, but subsequently redacted or withheld. Franchise Tax Board opposed Hyatt's motion to compel on the basis that many of the documents were privileged. The district court, acting on a discovery commissioner's recommendation, concluded that most of the documents were not privileged and ordered Franchise Tax Board to release those documents. The district court also entered a protective order governing the parties' disclosure of confidential information. The writ petition in Docket No. 35549 challenges those decisions.

Franchise Tax Board then moved for summary judgment, or dismissal under NRCP 12(h)(3), arguing that the district court lacked subject matter jurisdiction because principles of sovereign immunity, full faith and credit, choice of law, comity and administrative exhaustion all required the application of California law, and under California law Franchise Tax Board is immune from all tort liability. The district court denied the motion. The writ petition in Docket No. 36390 challenges that decision. The Multistate Tax Commission has filed an *amicus curiae* brief in support of Franchise Tax Board's comity argument.

Propriety of Writ Relief

We may issue an extraordinary writ at our discretion to compel the district court to perform a required act,[2] or to control discretion exercised arbitrarily or capriciously,[3] or to arrest proceedings that exceed the court's jurisdiction.[4] An extraordinary writ is not available if petitioner has a plain, speedy and adequate remedy in the ordinary course of law.[5]

A petition for a writ of prohibition may be used to challenge a discovery order requiring the disclosure of privileged information.[6] A Petition for a writ of mandamus may be used to challenge an order denying summary judgment or dismissal; however, we generally decline to consider such petitions because so few of them warrant extraordinary relief.[7] We may nevertheless choose to exercise our discretion and intervene, as we do here, to clarify an important issue of law and promote the interests of judicial economy.[8]

Docket No. 36390

Nevada and California have both generally waived their sovereign immunity from suit, but not their Eleventh Amendment immunity from suit in federal court, and have

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[2] NRS 34.160 (mandamus).

[3] *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981) (mandamus).

[4] NRS 34.320 (prohibition).

[5] NRS 34.170; NRS 34.330.

[6] *Wardleigh*, 111 Nev. at 350-51, 891 P.2d at 1183-84.

[7] *Smith v. District Court*, 113 Nev. 1343, 950 P.2d 280 (1997).

[8] *Id.*

extended the waivers to their state agencies or public employees, except when state statutes expressly provide immunity.[9] Nevada has expressly provided its state agencies with immunity for discretionary acts, unless the acts are taken in bad faith, but not for operational or ministerial acts, or for intentional torts committed within the course and scope of employment.[10] California has expressly provided its state taxation agency, Franchise Tax Board, with complete immunity.[11] The fundamental question presented is which state's law applies, or should apply.

Jurisdiction

Preliminarily, we reject Franchise Tax Board's arguments that the doctrines of sovereign immunity, full faith and credit, choice of law, or administrative exhaustion deprive the district court of subject matter jurisdiction over Hyatt's tort claims. First, although California is immune from Hyatt's suit in federal courts under the Eleventh Amendment, it is not immune in Nevada courts.[12] Second, the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy.[13] Third, the doctrines of sovereign immunity and full faith and credit determine the choice of

[9] NRS 41.031; Cal. Const. Art. 3, § 5; Cal. Gov't Code § 820.

[10] *See* NRS 41.032(2); *Foster v. Washoe County*, 114 Nev. 936, 941, 964 P.2d 788, 791 (1998); *State, Dep't Hum. Res. v. Jimenez*, 113 Nev. 356, 364, 935 P.2d 274, 278 (1997); *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888, 892 (1991).

[11] *See* Cal. Gov't Code §860.2; *Mitchell v. Franchise Tax Board*, 228 Cal. Rptr. 750 (Ct. App. 1986).

[12] *Nevada v. Hall*, 440 U.S. 410, 414-21 (1979).

[13] *Id.* at 421-24.

law with respect to the district court's jurisdiction,[14] while Nevada law is presumed to govern with respect to the underlying torts.[15] Fourth, Hyatt's tort claims, although arising from the audit, are separate from the administrative proceeding, and the exhaustion doctrine does not apply. The district court has jurisdiction; however, we must decide whether it should decline to exercise its jurisdiction under the doctrine of comity.

Comity

The doctrine of comity, is an accommodation policy, under which the courts of one state voluntarily give effect to the laws and judicial decisions of another state out of deference and respect, to promote harmonious interstate relations.[16] In deciding whether to respect California's grant of immunity to a California state agency, a Nevada court should give due regard to the duties, obligations, rights and convenience of Nevada's citizens and persons within the court's protection, and consider whether granting California's law comity would contravene Nevada's policies or interests.[17] Here, we conclude that the district court should have refrained from exercising its jurisdiction over the negligence claim under the comity doctrine, but that it properly exercised its jurisdiction over the intentional tort claims.

[14] *Id.* at 414-21.

[15] *Motenko v. MGM Dist., Inc.*, 112 Nev. 1038, 1041, 921 P.2d 933, 935 (1996).

[16] *Nevada v. Hall*, 440 U.S. at 424-27; *Mianecki v. District Court*, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983).

[17] *Mianecki*, 99 Nev. at 98, 658 P.2d at 425.

Negligent Acts

Although Nevada has not expressly granted its state agencies immunity for all negligent acts, California has granted the Franchise Tax Board such immunity.[18] We conclude that affording Franchise Tax Board statutory immunity for negligent acts does not contravene any Nevada interest in this case. An investigation is generally considered to be a discretionary function,[19] and Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused.[20] Thus, Nevada's and California's interests are similar with respect to Hyatt's negligence claim.

Intentional Torts

In contrast, we conclude that affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case. As previously stated, Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment. Hyatt's complaint alleges that Franchise Tax Board employees conducted the audit in bad faith, and committed intentional torts during their investigation. We believe that greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring

[18] Cal. Gov't Code § 860.2; *see Mitchell*, 228 Cal. Rptr. at 752.

[19] *Foster*, 114 Nev. at 941-43, 964 P.2d at 792.

[20] NRS 41.032(2).

complete immunity for its taxation agency.[21] Because we conclude that the district court properly exercised its jurisdiction over the intentional tort claims, we must decide whether our intervention is warranted to prevent the release of documents that Franchise Tax Board asserts are privileged.

Docket No. 35549

Franchise Tax Board invoked the deliberative process, attorney-client and work-product privileges as barriers to the discovery of various documents used or produced during its audit. The district court decided that most of the documents were not protected by these privileges, and ordered Franchise Tax Board to release them. With one exception, we conclude that the district court did not exceed its jurisdiction by ordering Franchise Tax Board to release the documents.

The deliberative process privilege does not apply because the documents at issue were not predecisional; that is, they were not precursors to the adoption of agency policy, but were instead related to the enforcement of already-adopted policies.[22] And if the privilege were to apply, it would be overridden by Hyatt's demonstrated need for the documents based on his claims of fraud and government misconduct.[23]

[21] *See Mianecki*, 99 Nev. at 98, 658 P.2d at 425.

[22] *See Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866-68 (D.C. Cir. 1980).

[23] *See In re Sealed Case*, 121 F.3d 729, 737-38 (D.C. Cir. 1997).

The attorney-client privilege does not apply because Franchise Tax Board did not demonstrate (1) that in-house-counsel Jovanovich was acting as an attorney, providing legal opinions, rather than as an employee participating in the audit process,[24] or (2) that the communications between Ms. Jovanovich and other Franchise Tax Board employees were kept confidential within the agency.[25]

The work-product privilege does apply, however, to document FTB No. 07381. This memorandum documenting a telephone conversation between Franchise Tax Board attorneys Jovanovich and Gould should be protected from disclosure. When the memorandum was generated, Jovanovich was acting in her role as an attorney representing Franchise Tax Board, as was Gould. The memorandum expresses these attorneys' mental impressions and opinions regarding the possibility of legal action being taken by Franchise Tax Board or Hyatt. Thus, this one document is, protected by the attorney work-product privilege.[26]

Finally, although Franchise Tax Board also challenges the district court's protective order, we decline to review the propriety of that discovery order in this writ proceeding. Although an extraordinary writ may be warranted to avoid the irreparable injury that would result from a

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[24] *See Upjohn Co. v. United States*, 449 U.S. 383, 389-97 (1981); *United States v. Chen*, 99 F.3d 1495, 1501-02 (9th Cir. 1996); *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996); *Texaco Puerto Rico v. Department of Consumer Aff.*, 60 F.3d 867, 884 (1st Cir. 1995).

[25] *See Coastal States*, 617 F.2d at 862-64.

[26] *See Wardleigh*, 111 Nev. at 357, 891 P.2d at 1188.

discovery order requiring disclosure of privileged information, extraordinary writs are not generally available to review discovery orders.[27] Franchise Tax Board has a plain, speedy and adequate remedy; it may challenge the order on appeal if it is aggrieved by the district court's final judgment.

Conclusion

We conclude that the district court should have declined to exercise jurisdiction over the negligence claim as a matter of comity. Accordingly, we grant the petition in Docket No. 36390 in part; the clerk of this court shall issue a writ of mandamus directing the district court to grant Franchise Tax Board's motion for summary judgment as to the negligence claim. We deny the petition in Docket No. 36390 with respect to the intentional tort claims, and we deny the alternative petition to limit the scope of trial.

We conclude that the district court exceeded its jurisdiction by ordering the release of one privileged document, but that Franchise Tax Board has not demonstrated that the district court exceeded its jurisdiction by ordering it to release any of the other discovery documents at issue. Accordingly, we grant the petition in Docket No. 35549 in part; the clerk of this court shall issue a writ of prohibition prohibiting the district court from requiring Franchise Tax Board to release document FTB No. 07381. We deny the writ petition in Docket No. 35549 with respect to all other documents.

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[27] *Clark County Liquor v. Clark*, 102 Nev. 654, 659, 730 P.2d 443, 447 (1986).

We vacate our stay of the district court proceedings.

It is so ORDERED.[28]

/s/ Maupin, C.J.
Maupin

/s/ Young, J.
Young

/s/ Shearing, J.
Shearing

/s/ Agosti, J.
Agosti

/s/ Leavitt, J.
Leavitt

cc: Hon. Nancy M. Saitta, District Judge
California Attorney General
McDonald Carano Wilson McCune
Bergin Frankovich & Hicks LLP/Las Vegas
McDonald Carano Wilson McCune
Frankovich & Hicks LLP/Reno
Bernhard & Leslie
Hutchison & Steffen
Riordan & McKenzie
Thomas K. Bourke
Marquis & Aurbach
Clark County Clerk

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[28] The Honorable Nancy Becker, Justice, voluntarily recused herself from participation in the decision of this matter.

ROSE, J., concurring in part and dissenting in part:

I would not grant comity to the petitioners in this case and would grant immunity only as given by the law of Nevada. In all other respects, I concur with the majority opinion.

In *Mianecki v. District Court*,[1] we were faced with a similar issue when the State of Wisconsin requested comity be granted by Nevada courts in order to recognize Wisconsin's sovereign immunity. In refusing to grant comity and recognize Wisconsin's sovereign immunity, we stated:

> In general, comity is a principle whereby the courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction out of deference and respect. The principle is appropriately invoked according to the sound discretion of the court acting without obligation. "[I]n considering comity, there should be due regard by the court to the duties, obligations, rights and convenience of its own citizens and of persons who are within the protection of its jurisdiction." With this in mind, we believe greater weight is to be accorded Nevada's interest in protecting its citizens from injurious operational acts committed within its borders by employees of sister states, than Wisconsin's policy favoring governmental immunity. Therefore, we hold that the law of Wisconsin should not be granted

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[1] 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983) (internal citations omitted).

comity where to do so would be contrary to the policies of this state.

Based on this very similar case, I would not grant comity to California, and I would extend immunity to the agents of California only to the extent that such immunity is given them by Nevada law. Denying a grant of comity is not uncommon, as California has denied comity to the state of Nevada in years past.[2]

/s/ Rose , J.
Rose

[2] *Nevada v. Hall*, 440 U.S. 410, 418 (1979).

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA DISTRICT JUDGE, Respondents, and GILBERT P. HYATT, Real Party in Interest.	No. 39274
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Appellant vs. GILBERT P. HYATT, Respondent.	No. 39312

ORDER DENYING PETITION FOR WRIT OF MANDAMUS OR PROHIBITION AND DISMISSING APPEAL

(Filed Apr. 4, 2002)

Docket No. 39274 is a petition for a writ of mandamus or prohibition, which challenges a district court order denying petitioner's motion to vacate a protective discovery order. Docket No. 39312 is an appeal from the same order.

In related writ proceedings, Docket No. 35549 and Docket No. 36390, we vacated the stay upon which petitioner's motion to vacate was premised. We rejected petitioner's argument that the district court lacked subject matter jurisdiction, and we also declined to review the propriety of the protective order. We conclude that extraordinary relief is also not warranted in this proceeding. Franchise Tax Board has a plain, speedy and adequate remedy; it may challenge the protective order on appeal if it is aggrieved by the district court's final judgment. Accordingly, we deny the petition in Docket No. 39274.[1]

The protective discovery order is an interlocutory order, which is not substantively appealable. The right to appeal is statutory; if no statute or court rule provides for an appeal, no right to appeal exists.[2] Accordingly, as we lack jurisdiction, we dismiss the appeal in Docket No. 39312.

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[1] *See* NRAP 21(b); *Smith v. District Court*, 107 Nev. 674, 818 P.2d 849 (1991); NRS 34.170 (mandamus); NRS 34.330 (prohibition).

[2] *See Taylor Constr. Co. v. Hilton Hotels*, 100 Nev. 207, 678 P.2d 1152 (1984); *Kokkos v. Tsalikis*, 91 Nev. 24, 530 P.2d 756 (1975).

It is so ORDERED.[3]

/s/ Maupin, C.J.
Maupin

/s/ Young, J.
Young

/s/ Shearing, J.
Shearing

/s/ Agosti, J.
Agosti

/s/ Rose, J.
Rose

/s/ Leavitt, J.
Leavitt

cc: Hon. Nancy M. Saitta, District Judge
California Attorney General
McDonald Carano Wilson McCune Bergin Frankovich & Hicks LLP/Las Vegas
McDonald Carano Wilson McCune Bergin Frankovich & Hicks LLP/Reno
Bernhard & Bradley, Chtd.
Hutchison & Steffen
Riordan & McKenzie
Thomas K. Bourke
Clark County Clerk

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[3] The Honorable Nancy Becker, Justice, voluntarily recused herself from participation in the decision of this matter.

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DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff, v. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive, Defendants.	)	CASE NO.: A382999 DEPT NO.: XVIII DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION (Filed Dec. 27, 1999)

Date of Conference: November 9, 1999

Time of Conference: 10:00 a.m.

NATURE OF ACTION

Protective Order for Confidential Information, decided in conjunction with the Defendant's Motion to Compel Discovery Responses.

APPEARANCES

At the November 9, 1999 hearing, Mark A. Hutchison, Thomas K. Bourke, and Donald J. Kula appeared on behalf of the Plaintiff, Gil Hyatt, and James A. Bradshaw, Thomas R. C. Wilson, Matthew C. Addison, and Felix E. Leatherwood appeared on behalf of the Defendant the Franchise Tax Board of California, *i.e.* the FTB.

FINDINGS

1. The FTB brought a Motion to Compel Production of Discovery Responses. The FTB attached to its motion its proposed Protective Order for Confidential Information.

2. Hyatt attached to his opposition to the FTB's Motion to Compel Discovery Responses his proposed Protective Order. Hyatt also attached to his opposition earlier versions of his proposed Protective Order that were subsequently modified based upon FTB objections.

3. The parties were unable to agree upon a stipulated Protective Order and requested that the Court resolve the dispute over the Protective Order in conjunction with the FTB's Motion to Compel Discovery Responses.

4. At the November 9, 1999 hearing on the FTB Motion to Compel Discovery Responses, the Discovery Commissioner found that the proposed Protective Order submitted by Hyatt, with certain modifications specified

by the Discovery Commissioner during the hearing, is appropriate in this case because it will provide protection for "Confidential Information" so designated by the parties and will also allow the parties to use "Confidential Information" as necessary within the confines of this litigation in order to prosecute, in the case of Hyatt, and defend, in the case of the FTB, the claims at issue.

RECOMMENDATION

The following Protective Order is recommended:

1. Definitions

A. "FTB" shall mean defendant Franchise Tax Board of the State of California, and specifically its employees, officers, or board members to whom it is necessary to show "Confidential Information," subject to further limitations below, in order to assist the FTB attorneys with respect to the defense of this Action.

B. "Hyatt" shall mean plaintiff Gil Hyatt.

C. "Party" and "Parties" shall mean one or more of the plaintiff or defendant in this action.

D. "Confidential Information" shall mean and be limited to "Hyatt Confidential Information" and "FTB Confidential Information" whether produced or otherwise disclosed in this action, including (a) any documents and things and copies thereof, (b) any answers to interrogatories and responses to requests for admissions, and (c) any testimony given in this Action by the Parties, their officers, directors, agents and/or employees, or by other witnesses, whether by deposition or at trial.

E. The designation "Confidential – NV Protective Order" shall be plainly legible on each page of each

document. In lieu of marking the original of the documents, the designating party may mark the copies that are produced or exchanged.

Confidential Information in other than a documentary or written form shall be identified as Confidential Information on the stenographic record contemporaneously with testimony revealing Confidential Information or within 30 days after the written transcript of such proceeding has been prepared and disseminated by the Court reporter.

Abuse of the "Confidential – NV Protective Order" designation shall result in sanctions to the offending party.

2. This Protective Order shall be governed by Rule 26 of the Nevada Rules of Civil Procedure and applied and interpreted pursuant to Nevada law. Confidential Information disclosed by Hyatt to the FTB is subject to all requirements of confidentiality imposed by the laws of the State of Nevada. This order is not intended to supplant, alter, modify, or reduce the FTB's requirements of confidentiality under California law. This order is intended only to assist and facilitate the exchange of Confidential Information between the Parties to this Action and assist and facilitate this Court in its administering of such exchanges.

A. Hyatt Confidential Information may not be disclosed, revealed, or disseminated by the FTB and its counsel and FTB Confidential Information may not be disclosed, revealed, or disseminated by Hyatt and its counsel, except to the following individuals and in the following manner:

(i) To the counsel of record for the opposing Party and counsel for any witnesses and their respective stenographic, clerical, and paralegal employees. It shall be the responsibility of the attorneys to

ensure that their respective stenographic, clerical, and paralegal employees understand and comply with this Protective Order. Violation of the Protective Order by any employee will be imputed to the attorneys.

(ii). To the opposing Party. In the case of the FTB this includes employees, officers, and board members to the extent necessary to assist FTB counsel in the defense of this Action.

(iii). To court reporters and videographers covered by Paragraph 9 herein, after reading this Protective Order and executing a copy of Exhibit A attached hereto.

(iv). To experts or consultants, whose advice and consultation are being or will be used by the opposing Party in this Action, provided that such experts or consultants read this Protective Order and execute a copy of Exhibit A attached hereto.

(v). To such other persons as hereafter may be designated by written stipulation of the Parties or by further order of the Court on motion by either party subject to the notice provisions of Paragraph 16 below.

3. The FTB and its attorneys shall not use Hyatt Confidential Information and Hyatt and his attorneys shall not use FTB Confidential Information in any manner whatsoever except solely for discovery and preparation of discovery, preparation for trial, trial, and any appeals related to this Action. Furthermore, no Party or employee, officer, or board member of the FTB, or any other person, firm, corporation, attorney, or other entity subject to this Protective Order shall give, show, disclose, make available, or communicate Confidential Information (in any form and whether or not specific identifying information has been redacted or modified) to any person, firm, corporation, or other entity not

expressly authorized by this Protective Order to receive such Confidential Information.

4. To the extent that either Party desires to use Confidential Information acquired under the terms of this Protective Order in the pending tax assessment and collection case which the FTB is now pursuing against Hyatt in the State of California including, but not limited to, the pending protests for taxable years 1991 and 1992 ("California Tax Case"), the requesting Party shall give notice to the opposing Party and specify the precise Confidential Information it desires to be submitted as part of that California Tax Case. If the opposing Party objects to the use of the Confidential Information in the California Tax Case, the requesting Party must seek and obtain permission to use and submit the Confidential Information in the California Tax Case in accordance with California law. In the event Hyatt does not to agree to voluntarily produce the Confidential Information to the California Tax Case, the FTB may seek to compel Hyatt to produce the requested Confidential Information in the California Tax Case through issuance and service of an administrative subpoena as governed by California law. This Protective Order in no way affects, limits, or modifies either parties' respective rights in regard to seeking or opposing an administrative Subpoena under California law.

Notwithstanding any other provision in this Protective Order, no FTB attorneys and/or FTB staff assigned to the pending protests for 1991 and 1992 or assigned to the California Tax Case shall have access to any Confidential Information, absent the FTB giving notice to Hyatt pursuant to this Protective Order and specifying the precise Confidential Information the FTB desires to provide to those individuals as part of that California Tax Case.

5. All Confidential Information filed with the Court for any purpose shall be filed in a sealed envelope or other container marked on the outside with the title of the action, an identification of each item within, and a statement substantially as follows:

> Confidential Information Subject to Protective Order. This item shall not be opened except as ordered by the Court in this action or upon written stipulation executed by all the Parties and filed in Court in this action.

This envelope or other container shall not be opened except as ordered by the Court or upon written stipulation executed by the Parties to this action or their counsel and filed in Court in this action. All such documents so filed in Court shall be treated in accordance with the provisions of this Protective Order relating to Confidential Information.

6. In the event Hyatt or the FTB wishes to use or refer to any Confidential Information in any affidavits, briefs, memoranda of law, or other papers filed in Court in this action, such affidavits, briefs, memoranda of law, or other papers so filed shall be designated as "Confidential Information – Subject to Protective Order" and shall be maintained under seal by the Court and treated by the Court in accordance with the provisions of this Protective Order relating to Confidential Information.

7. Counsel shall, while eliciting testimony concerning Confidential Information or which might result in the disclosure of Confidential Information, exclude from the room during a deposition, hearing, trial, or other proceedings, any person who is not entitled under this Protective Order to receive Confidential Information. Confidential Information shall not be disclosed to the witness then testifying except in strict conformity with the provisions of this Protective Order, including the

requirement that the testifying witness agree to be bound by the terms of this Protective Order by executing the Agreement set forth in Exhibit A hereof.

8. Any court reporter or transcriber who reports or transcribes testimony in this action at depositions, hearings, or other proceedings shall agree by a statement on the record, before recording or transcribing any such testimony constituting Confidential Information, that all such testimony and information revealed at the deposition, hearing, or other proceeding is and shall remain confidential and shall not be disclosed by any such reporter or transcriber except to attorneys for a Party who are authorized by this Protective Order and any other person who is authorized by this Protective Order to be present while such testimony is being given, and that copies of any transcript, reporter's notes, or any other transcription records of any such testimony shall be retained in confidence and safekeeping by such reporter or transcriber or shall be delivered to the Court in the manner specified in Paragraphs 5 and 6 herein, or to the attorneys for the Parties.

9. The Clerk of the Court is directed to maintain under seal all documents and all transcripts of deposition testimony filed with this Court in this action by any Party which are in whole or in part designated as Confidential Information including all pleadings, deposition transcripts, exhibits, discovery responses, or memoranda purporting to reproduce or paraphrase such information. The person filing such material shall advise the Clerk, as set forth in paragraph 5 hereof, that all or a designated portion thereof is subject to this Protective Order and is to be kept under seal. Upon the default of the filing Party to so designate, any Party may so advise the Court.

10. No Party to this proceeding may offer or elicit any testimony, exhibits, or other evidence containing or

disclosing Confidential Information unless such Party first ensures that adequate safeguards against unauthorized disclosure of such information have been implemented. Such safeguards shall include the exclusion from such proceedings of any persons not authorized access to such information pursuant to the terms of this Protective Order and other measures reasonably necessary in order to preclude unauthorized disclosure of such information. In the event that any Confidential Information is used in any court proceeding, it shall not lose its confidential status merely through such use.

11. Nothing in this Protective Order shall preclude any Party to the action, its attorneys, or any other person from disclosing or using, in any manner or for any purpose, any information or documents not obtained in discovery from the producing Party in this action, if such information was lawfully obtained, even though the same information or documents may have been produced in discovery in this action and designated as Confidential Information.

12. Nothing in this Protective Order shall preclude any party to this action or their attorneys from showing a document designated as Confidential Information to an individual who either prepared, is a designated or authorized recipient of or previously lawfully reviewed the document.

13. Nothing herein shall prevent disclosure beyond the terms of this Protective Order if the disclosing Party consents in writing to such disclosure of information designated as Confidential Information.

14. This Protective Order involves only the relative rights and obligations of the Parties as to the confidentiality of any information disclosed, or documents supplied, in this action. This Protective Order does not abrogate or diminish any contractual, statutory, or other

legal obligation or right of any Party or person with respect to any Confidential Information.

15. The provisions of this Protective Order shall not terminate at the conclusion of this action and may be enforced in this action or in a separate proceeding in the discretion of the Party alleging any breach of this Protective Order.

16. The Parties hereto may stipulate, subject to the approval of the Court, to any mutually agreeable changes to the provisions hereof. If a Party requests any modification(s) to the Protective Order and the Parties are unable to reach an agreement after a meet and confer, the Party requesting a modification may file a motion with the Court seeking such modification and such motion will be heard by the Court in the ordinary course of business.

17. This Protective Order shall be binding upon the Parties, their employees, officers, board members, agents, attorneys, and all persons encompassed by paragraph 2 whether or not such persons individually have executed Exhibit A. The court retains jurisdiction to enforce the provisions of this Protective Order upon the request of any Party or *sua sponte* and to make such arrangements, modifications, and additions to this Protective Order as the Court may from time to time deem appropriate.

18. If a party believes that information it intends to use in this action or Information requested by the opposing party in discovery needs a higher level of protection (*e.g.*, "Attorneys' Eyes Only") than that accorded "Confidential Information" as set forth in this protective order, that party must make a motion for a protective order with the Court. Such motion must set forth the basis for the additional level of protection needed as well as the limitations desired by that moving

party on the dissemination of the information. The party seeking the higher level of protection will have the burden of establishing the need and appropriateness of the higher level of protection.

DATED this 3rd day of December, 1999.

/s/ Thomas W. Biggar
DISCOVERY COMMISSIONER

Submitted by:

HUTCHISON & STEFFEN, LTD.

/s/ Thomas L. Steffen
Thomas L. Steffen
Mark A. Hutchison
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Approved as to form:

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/s/ Bryan R. Clark
Thomas R. C. Wilson
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Attorneys for Defendant

NOTICE

Pursuant to NRCP 16.1(d)(2), you are hereby notified you have five (5) days from the date you receive this document within which to file written objections.

[Pursuant to E.D.C.R. 2.34(f), an objection must be filed and served no more than five (5) days after receipt of the Commissioner's Report. The Commissioner's Report is deemed received when signed and dated by a party, his attorney or his attorney's employee, or three (3) days after mailing to a party or his attorney, or three (3) days after the clerk of the court deposits a copy of the

Report in a folder of a party's lawyer in the Clerk's office.]

A copy of the foregoing Discovery Commissioner's Report was:

_____ Mailed to Plaintiff/Defendant on the _____day of _____, 1999 at the following address:

James W. Bradshaw, Esq.
McDonald Carano Wilson
McCune Bergin Frankovich & Hicks
241 Ridge Street, 4th Floor
Reno, Nevada 89501
Attorney for Defendant

_✓_ Placed in the folder of Plaintiff/Defendant's counsel in the Clerk's office on the 7th day of DECEMBER, 1999.

SHIRLEY R. PARRAGUIRRE
By: /s/ Mary Daigle
Deputy Clerk
MARY DAIGLE

Case Name: *Hyatt v. Franchise Tax Board*

Case Number: A382999

ORDER

The Court, having reviewed the above report and recommendations prepared by the Discovery Commissioner, and,

_____ The parties having waived the right to object thereto,

_____ No timely objections having been filed thereto,

✓ BW Having received the objections thereto and the written arguments in support of said objections, and good cause appearing,

✓ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted.

_____ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted as modified in the following manner. (attached hereto)

_____ IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report is set for _____, 1999.

Dated this 21st day of December, 1999.

/s/ Nancy M. Saitta
DISTRICT COURT JUDGE

EXHIBIT A

AGREEMENT CONCERNING MATERIAL COVERED BY A PROTECTIVE ORDER AND ORDER ENTERED IN THE DISTRICT COURT, CLARK COUNTY, NEVADA

I, the undersigned, hereby acknowledge that I have read the attached Protective Order entered in the District Court, Clark County, Nevada in Case No. A2382999 and understand the terms thereof and agree to be bound by all such terms. Without limiting the

generality of the foregoing, I agree not to disclose to any person or entity not authorized to receive such "Confidential Information," pursuant to the terms of said Protective Order, any document or any information designated as "Confidential Information" or any copies of extracts or information derived therefrom, which have been disclosed to me. I further agree to use any information disclosed to me in connection with the above-mentioned case solely for the purpose of this case and for no other purposes.

The undersigned hereby irrevocably submits his/her person to the jurisdiction of the District Court, Clark County, Nevada for the purpose of enforcing said Protective Order:

Date:

Signature

Type or print name:

IN THE SUPREME COURT
OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE. Respondents, and GILBERT P. HYATT, Real Party in Interest.	No. 36390

WRIT OF MANDAMUS

TO: The Honorable Nancy M. Saitta, Judge of the Eighth Judicial District Court:

WHEREAS, this Court having made and filed its written decision that a writ of mandamus issue,

NOW THEREFORE, you are instructed to grant Franchise Tax Board's motion for summary judgment in light of the lack of evidence presented, in the case entitled Hyatt vs. Franchise Tax Board No. A382999.

WITNESS The Honorables A. William Maupin, Chief Justice, Cliff Young, Miriam Shearing, Deborah A.

Agosti, Robert E. Rose and Myron E. Leavitt, Associate Justices of the Supreme Court of the State of Nevada, and attested by my hand and seal this 13th day of June, 2001.

[SEAL]

/s/ Jannette Bloom
Supreme Court Clerk

IN THE SUPREME COURT
OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE.

Respondents,

and

GILBERT P. HYATT,

Real Party in Interest.

No. 35549

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE.

Respondents,

and

No. 36390

GILBERT P. HYATT,

Real Party in Interest.

ORDER GRANTING PETITION (DOCKET NO. 36390 AND DISMISSING PETITION (DOCKET NO. 35549)

(Filed June 13, 2001)

Franchise Tax Board Petitions this court for a writ of mandamus and/or prohibition in Docket No. 35549, arguing that the district court erred in determining that certain documents were not protected by the attorney-client, work product and/or deliberative process privileges and subsequently ordering those documents released. Franchise Tax Board separately petitions this court for a writ of mandamus in Docket No. 36390, arguing that the district court erred in denying its motion for summary judgment because the doctrine of comity precludes the district court's exercise of jurisdiction over the claims since Franchise Tax Board is immune from liability under California law.

We conclude that the district court did err in denying Franchise Tax Board's motion for summary judgment, albeit on grounds other than those alleged in the petition. Thus, we grant the petition for a writ of mandamus in Docket No. 36390 and direct the district court to conduct further proceedings consistent with this order. Because our resolution of Docket No. 36390 renders the petition in Docket No. 35549 moot, we deny that petition.

A writ of mandamus may be issued to compel the performance of an act that the law requires as a duty

resulting from an office, or to control an arbitrary or capricious exercise of discretion.[1] This extraordinary remedy is available only when there is no plain, speedy and adequate remedy at law, and it is entirely within this court's discretion whether to issue a writ.[2] Even though a writ of mandamus is the appropriate remedy to review the denial of a motion for summary judgment because the order is otherwise unappealable, this court has limited the exercise of this extraordinary remedy to instances when judicial economy or the need to clarify important issues require our intervention.[3] Because this case implicates the principles of Full Faith and Credit and comity, which are of great importance with respect to interpreting each state's sovereign responsibilities and rights, we elect to exercise our extraordinary writ powers.

According to the United States Supreme Court case of *Nevada v. Hall*[4] and the Nevada case of *Mianeck v. District Court*,[5] the crucial inquiry in determining whether to afford deference to another state's laws under the doctrines of Full Faith and Credit or comity is whether the sister state's laws conflict with or contravene the forum state's laws or policies. In this case, our inquiry rests in

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[1] NRS 34.160; *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981).

[2] NRS 34.170; *Smith v. District Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

[3] *Sorenson v. Pavlikowski*, 94 Nev. 440, 442, 581 P.2d 851, 853 (1978); *Smith v. District Court*, 113 Nev. 1343, 950 P.2d 280 (1997); *State v. Babayan*, 106 Nev. 155, 787 P.2d 805 (1990); *cf. State ex rel. Dep't Transp. v. Thompson*, 99 Nev. 358, 361 662 P.2d 1338, 1340 (1983).

[4] 440 U.S. 410, 422, 424 n.24 (1979).

[5] 99 Nev. 93, 96, 658 P.2d 422, 424 (1984).

determining whether Nevada law, which grants immunity to state agencies only for discretionary acts,[6] is affronted by recognizing California law, which grants Franchise Tax Board immunity for intentional torts, as well as discretionary and operational acts.[7]

Although the parties addressed only the issue of comity in Docket No. 36390, our review of the record to determine whether comity or Full Faith and Credit should be applied revealed that there is no probative evidence to support Hyatt's claims. Thus, because Hyatt failed to meet his burden of providing probative evidence to generate genuine issues of material fact on each of his claims, the district court erred in denying Franchise Tax Board's motion for summary judgment. We, therefore, grant the petition for a writ of mandamus.

In the context of a summary judgment motion, Franchise Tax Board, as the moving party, has the burden of establishing the non-existence of genuine issues of material fact.[8] But this burden is sustained if Franchise Tax Board demonstrates a lack of probative evidence of at least one element of Hyatt's prima facie case.[9] Hyatt then has the burden of demonstrating specific evidence indicating a genuine dispute of fact.[10] Mere allegations are insufficient

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[6] NRS 41.032(2); *cf.* NRS 41.031; *Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 391, 469 P.2d 399, 400 (1970).

[7] Cal Gov't Code § 860.2; *see Mitchell v. Franchise Tax Board*, 228 Cal. Rptr. 750 (Ct. App. 1986).

[8] NRCP 56(c); *NGA #2 Ltd. Liab. Co. v. Rains*, 113 Nev. 1151, 1156, 946 P.2d 163, 166-67 (1997).

[9] *Rains*, 113 Nev. at 1156, 946 P.2d at 167 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

[10] *Id.* at 1157, 946 P.2d at 167.

to sustain this burden; specific facts must be produced to show a genuine dispute that justifies the denial of a motion for summary judgment.[11]

Upon our review of the record, we conclude that Hyatt failed, as a matter of law, to meet his burden to produce sufficient facts,[12] indicating a genuine dispute, that Franchise Tax Board's acts during its investigation constituted intentional torts.[13] There is no evidence, aside from Hyatt's own conclusory allegations, that Franchise Tax Board's investigation unreasonably intruded into his private life or seclusion, published false information about him, or published information to third parties that was not of a legitimate public concern. The myriad depositions and documents submitted to this court are undisputed and indicate that Franchise Tax Board's investigative acts were in line with a standard investigation to determine

[11] NRCP 56(e); *see Bird v. Casa Royale West*, 97 Nev. 67, 70-71, 624 P.2d 17, 19 (1981); *see also Garvey v. Clark County*, 91 Nev. 127, 130, 532 P.2d 269, 271 (1975).

[12] Franchise Tax Board has met its burden that at least one element of Hyatt's claims has not been shown by demonstrating undisputed facts that Franchise Tax Board (1) never produced false statements, (2) never publicized its investigation or findings outside the scope of the investigation, (3) complied with its internal operating procedures with regard to contacting individuals, and (4) merely visited Hyatt's house and conducted its investigation through phone calls and letters.

[13] *See, e.g., Barmettler v. Reno Air, Inc*, 114 Nev. 441, 447-49, 956 P.2d 1382, 1386-87 (1998) (negligent misrepresentation and outrage), *limited by Olivero v. Lowe*, 116 Nev. 395, 995 P.2d 1023 (2000); *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 628-36, 895 P.2d 1269, 1278-83 (1995) (invasion of privacy claims); *Posadas v. City of Reno*, 109 Nev. 448, 457, 851 P.2d 444-45 (1993) (abuse of process); *M & R Investment Co. v. Mandarino*, 103 Nev. 711, 718-19, 748 P.2d 488, 493 (1987) (invasion of privacy claims); *Star v. Rabello*, 97 Nev. 124, 125-26, 625 P.2d 90, 92 (1981) (outrage).

residency status for taxation pursuant to its statutory authority. Merely because a state agency is performing an investigation in the course of its duties does not automatically render its acts an invasion of privacy or otherwise intentionally tortious absent evidence of unreasonableness or falsity of statements. No such evidence has been presented in this case.

There is also insufficient evidence of Hyatt's remaining claim of negligent misrepresentation.[14] As with Hyatt's claims for intentional torts, there is no evidence that Franchise Tax Board supplied any false information regarding confidentiality or business relations.

In light of the lack of evidence supporting Hyatt's claims for intentional torts and negligent misrepresentation, we conclude that it was error for the district court to deny the motion for summary judgment.[15] Because we conclude that it was error to deny Franchise Tax Board's motion for summary judgment, and Hyatt's claims should have been dismissed, we need not address the issues raised in Docket No. 35549 regarding purportedly privileged materials.

Consistent with our discussion above, we therefore

GRANT the petition in Docket No. 36390 AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to grant Franchise Tax Board's motion for summary judgment in

[14] *See Barmettler*, 114 Nev. at 447-49, 956 P.2d at 1386-87.

[15] Although neither party addressed this issue in the petitions to this court, the record indicates that the issue of the absence of probative evidence was presented to the district court on the initial motion.

light of the lack of evidence presented.[16] We DISMISS AS MOOT the petition in Docket No. 35549.

/s/ Maupin, , C.J.
Maupin

/s/ Young , J
Young

/s/ Shearing , J
Shearing

/s/ Agosti , J
Agosti

/s/ Rose , J
Rose

/s/ Leavitt , J
Leavitt

cc: Hon. Nancy M. Saitta, District Judge
California Attorney General
McDonald Carano Wilson McCune Bergin Francovich & Hicks
Bernhard & Leslie
Hutchison & Steffen
Thomas K. Bourke
Riordan & McKenzie
Marquis & Aurbach
Clark County Clerk

[16] The Honorable Nancy Becker, Justice, voluntarily recused herself from participation in the decision of this matter.

Statutory Attachments

1. United States Constitution Provisions:

Article IV. The States and The Federal Government

Section One. Official Acts of the States

Full Faith and Credit

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

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2. Government Code § 860.2. Injuries caused by proceedings or application of laws

Neither a public entity nor a public employee is liable for an injury caused by:

(a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax.

(b) An act or omission in the interpretation or application of any law relating to a tax.

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3. Government Code § 905.2. Claims for money or damages against state

There shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part all claims for money or damages against the state:

(a) For which no appropriation has been made or for which no fund is available but the settlement of which has been provided for by statute or constitutional provision.

(b) For which the appropriation made or fund designated is exhausted.

(c) For money or damages (1) on express contract, or (2) for an injury for which the state is liable.

(d) For which settlement is not otherwise provided for by statute or constitutional provision.

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4. Government Code § 911.2. Time of presentation of claims; limitation

A claim relating to a cause of action for death or for injury to person or to personal property or growing crops shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than six months after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than one year after the accrual of the cause of action.

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5. Government Code § 945.4. Necessity of written claim acted upon by board or deemed to have been rejected

Except as provided in Sections 946.4 and 946.6, no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing

with Section 910) of Part 3 of this division until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board, in accordance with Chapters 1 and 2 of Part 3 of this division.

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6. Revenue & Taxation Code § 19041. Protest against proposed deficiency assessment; time; contents

(a) Within 60 days after the mailing of each notice of proposed deficiency assessment the taxpayer may file with the Franchise Tax Board a written protest against the proposed deficiency assessment, specifying in the protest the grounds upon which it is based.

(b) Any protest filed with the Franchise Tax Board on or before the last date specified for filing that protest by the Franchise Tax Board in the notice of proposed deficiency assessment (according to Section 19034) shall be treated as timely filed.

(c) The amendments made by the act adding this subdivision 1 shall apply to any notice mailed after December 31, 1999.

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7. Revenue & Taxation Code § 21021. Action by taxpayer aggrieved by action or omission by officer or employee in reckless disregard of published procedures; amount of damages; frivolous position; penalty

(a) If any officer or employee of the board recklessly disregards board published procedures, a taxpayer aggrieved

by that action or omission may bring an action for damages against the State of California in superior court.

(b) In any action brought under subdivision (a), upon a finding of liability on the part of the State of California, the state shall be liable to the plaintiff in an amount equal to the sum of all of the following:

(1) Actual and direct monetary damages sustained by the plaintiff as a result of the actions or omissions.

(2) Reasonable litigation costs, as defined for purposes of Sections 19420 and 26491.1

(c) In the awarding of damages under subdivision (b), the court shall take into consideration the negligence or omissions, if any, on the part of the plaintiff which contributed to the damages.

(d) Whenever it appears to the court that the taxpayer's position in the proceedings brought under subdivision (a) is frivolous, the court may impose a penalty against the plaintiff in an amount not to exceed ten thousand dollars ($10,000). A penalty so imposed shall be paid upon notice and demand from the board and shall be collected as a tax imposed under Part 10 (commencing with Section 17001) or Part 11 (commencing with Section 23001).

COMP
Thomas L. Steffen (1300)
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HUTCHISON & STEFFEN
530 South Fourth Street
Las Vegas, NV 89101
(702) 385-2500

Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff, v. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive, Defendants.	Case No. A382999 Dept. No. X Docket No. R FIRST AMENDED COMPLAINT (Filed June 12, 1998) Jury Trial Demanded Exempt from Arbitration: Declaratory Relief, Significant Public Policy and Amount in Excess Of $40,000

Plaintiff, Gilbert P. Hyatt, in this First Amended Complaint, complains against defendants, and each of them, as follows:

PARTIES

1. Plaintiff resides in Clark County, Nevada and has done so since September 26, 1991.

2. Defendant Franchise Tax Board of the State of California (hereinafter "FTB") is a governmental agency of the State of California with its principal office located in Sacramento, California, and a district office located in Los Angeles, California. The FTB's function is to ensure the collection of state income taxes from California residents and from income earned in California by non-residents.

3. The identity and capacities of the defendants designated as Does 1 through 100 are so designated by plaintiff because of his intent by this complaint to include as named defendants every individual or entity who, in concert with FTB as an employee, representative, agent or independent contractor, committed the tortious acts described in this complaint. The true names and capacities of these Doe defendants are presently known only to the FTB, who committed the tortious acts in Nevada with the assistance of said Doe defendants who are designated by fictitious names only until plaintiff is able, through discovery, to obtain their true identities and capacities; upon ascertaining the true names and capacities of these Doe defendants, plaintiff shall promptly amend this complaint to properly name them by their actual identities and capacities. For pleading purposes, whenever this complaint refers to "defendants," it shall refer to these Doe defendants, whether individuals, corporations or other forms of associations or entities, until their true names are added by amendment along with particularized facts concerning their conduct in the commission of the tortious acts alleged herein.

4. Plaintiff is informed and believes, and on that basis alleges, that defendants, in acting or omitting to act as alleged, acted or omitted to act within the course and scope of their employment or agency, and in furtherance of

their employer's or principal's business, whether the employer or principal be the FTB or some other governmental agency or employer or principal whose identity is not yet known; and that FTB and defendants were otherwise responsible and liable for the acts and omissions alleged herein.

5. This action is exempt from the court-annexed arbitration program, pursuant to Rule 3, because: (1) this is an action for, inter alia, declaratory relief; (2) substantial issues of public policy are implicated concerning the sovereignty of the State of Nevada and the integrity of its territorial boundaries as opposed to governmental agencies of another state who enter Nevada in an effort to extraterritorially, arbitrarily and deceptively enforce their policies, rules and regulations on residents of Nevada in general, and plaintiff Gilbert P. Hyatt in particular, and (3) the sums of money and damages involved herein far exceed the $40,000.00 jurisdictional limit of the arbitration program.

6. Plaintiff hereby requests a jury trial for his Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Causes of Action.

SUMMARY OF CLAIMS

7. Plaintiff, by this action, seeks: (1) declaratory relief under NRS 30.010 *et seq.* to confirm plaintiff's status as a Nevada resident effective as of September 26, 1991 and continuing to the present and, correspondingly, his non-residency during said period in California (FIRST CAUSE OF ACTION); (2) recovery of compensatory and punitive damages against the FTB and the defendants for invasion of plaintiff's right of privacy resulting from their

investigation in Nevada of plaintiff's residency, domicile and place of abode and causing (a) an unreasonable intrusion upon plaintiff's seclusion (SECOND CAUSE OF ACTION); (b) an unreasonable publicity given to private facts (THIRD CAUSE OF ACTION); (c) casting plaintiff in a false light (FOURTH CAUSE OF ACTION); (3) recovery of compensatory and punitive damages against the FTB and the defendants for their outrageous conduct in regard to their investigation in Nevada of plaintiff's residency, domicile and place of abode (FIFTH CAUSE OF ACTION); (4) recovery of compensatory and punitive damages against the FTB and defendants for an abuse of process (SIXTH CAUSE OF ACTION); (5) recovery of compensatory and punitive dmages against the FTB and defendants for fraud (SEVENTH CAUSE OF ACTION); and (6) for compensatory damages against the FTB and defendants for negligent misrepresentation (EIGHTH CAUSE OF ACTION). The claims specified in this paragraph constitute EIGHT separate causes of action as hereinafter set forth in this complaint.

FACTUAL BACKGROUND

Plaintiff's Residency in Nevada

8. Plaintiff moved to the State of Nevada, County of Clark, and established full-time residency here on September 26, 1991 and has remained a full-time, permanent resident since that time. Prior to his relocation to Nevada, plaintiff resided in Southern California. Plaintiff is a highly successful inventor. Specifically, plaintiff has been granted numerous important patents for a wide range of inventions relating to computer technology. Plaintiff primarily works alone in the creation and development of his inventions and greatly values his privacy both in his

personal life and business affairs. After certain of his important inventions were granted patents in 1990, plaintiff began receiving a great deal of unwanted and unsolicited publicity, notoriety and attention. To greater protect his privacy, to enjoy the social, recreational, and financial advantages Nevada has to offer, and to generally enhance the quality of his life and environment, plaintiff relocated to Nevada on September 26, 1991. This move took place after much consideration and almost an entire year of planning.

9. The following events are indicative of the fact that on September 26, 1991, plaintiff commenced both his residency and intent to remain in Nevada, and a continuation of both down to the present: (1) the sale of plaintiff's California home in October 1991; (2) his renting and residing at an apartment in Las Vegas commencing in October 1991 and continuing until April 1992 when plaintiff closed the purchase of a home in Las Vegas; (3) in November 1991, plaintiff registered to vote in Nevada, obtained a Nevada driver's license, and joined a religious organization in Las Vegas; (4) plaintiffs' [sic] extensive search, commencing in early October 1991, for a new home in Las Vegas, and in the process utilizing the services of various real estate brokers; (5) during the process of finding a home to purchase, plaintiff made numerous offers to buy; (6) plaintiff's purchase of a new home in Las Vegas on April 3, 1992; (7) plaintiff maintained and expanded his business interests from Las Vegas; and (8) plaintiff has, through the years from September 26, 1991 and down to the present, contacted persons in high political office, in the professions, and other walks of life, as a true Nevada resident of some renown would, not concealing the fact of his Nevada residency. In sum, plaintiff has

substantial evidence, both testimonial and documentary, in support of the fact of his full-time residency, domicile and place of abode in Nevada commencing on September 26, 1991 and continuing to the present.

The FTB and Defendants' Investigation of Plaintiff in Nevada

10. Because plaintiff was a resident of California for part of 1991, plaintiff filed a Part-Year state income tax return with the State of California for 1991 (the "1991 Return"). Said return reflects plaintiff's payment of state income taxes to California for income earned during the period of January 1 through September 26, 1991.

11. In or about June of 1993 – 21 months after plaintiff moved to Nevada – for reasons that have never been specified, but are otherwise apparent, the FTB began an audit of the 1991 Return. In or about July of 1993, as part of its audit, the FTB began to investigate plaintiff by making or causing to be made numerous and continuous contacts directed at Nevada. Initially, the FTB sent requests to Nevada government agencies for information concerning plaintiff – a paper foray that continued for the next several years.

12. In or about January of 1995, FTB auditors began planning a trip to Las Vegas, the purpose of which was to enhance and expand the scope of their investigation of plaintiff. In March of 1995, the FTB and defendants commenced a "hands on" investigation of plaintiff that included unannounced confrontations and questioning about private details of plaintiff's life. These intrusive activities were directed at numerous residents of Nevada,

including plaintiff's current and former neighbors, employees of businesses and stores frequented by plaintiff, and alas, even his trash collector!

13. Both prior and subsequent to the intrusive, "hands on" investigations described in paragraph 12. above, the FTB propounded to numerous Nevada business and professional entities and individual residents of Nevada "quasi-subpoenas" entitled to "Demand to Furnish Information" which cited the FTB's authority under California law to issue subpoenas and demanded that the recipients thereof produce the requested information concerning plaintiff. Plaintiff is informed and believes, and therefore alleges, that the FTB never sought permission from a Nevada court or any Nevada government agency to send such "quasi-subpoenas" into Nevada where, induced by the authoritative appearance of the inquisitions, many Nevada residents and business entities did respond with answers and information concerning plaintiff.

14. Subsequent to the documentary and "hands on" forays into Nevada by the FTB and defendants, the FTB also sent correspondence, rather than "quasi-subpoenas," to Nevada Governor Bob Miller, Nevada Senator Richard Bryan and other government officials and agencies seeking information regarding plaintiff and his residency in Nevada. Plaintiff is further informed and believes, and therefore alleges, that the FTB intentionally sent unauthorized "quasi-subpoenas" (i.e., "Demand to Furnish Information") to private individuals and businesses in a successful attempt to coerce their cooperation through deception and the pretense of an authoritative demand, while on the other hand, sending respectful letter requests for information to Nevada governmental agencies and officials who undoubtedly would have recoiled at the attempt

by the FTB to exercise extraterritorial authority in Nevada through the outrageous means of the bogus subpoenas.

15. Plaintiff neither authorized the FTB's aforementioned documentary and pretentious forays into Nevada, nor was plaintiff ever aware that such information was being sought in such a manner until well after the "quasi-subpoenas" had been issued and the responses received. Similarly, plaintiff had no knowledge of the FTB and defendants' excursions to Las Vegas to investigate plaintiff or the FTB's correspondence with Nevada government agencies and officials until well after such contacts had taken place. Upon information and belief, plaintiff alleges that all of the above-described activities were calculated to enable the FTB to develop a colorable basis for assessing a huge tax against plaintiff despite the obvious fact that the FTB was proceeding against a bona fide resident of Nevada.

Assessment for 1991

16. On April 23, 1996, after the FTB had completed its audit and investigation of the 1991 Return, the FTB sent a Notice of Proposed Assessment (i.e., a formal notice that taxes are owed) to plaintiff in which the FTB claimed plaintiff was a resident of California – not Nevada – until April 3, 1992. The FTB therefore assessed plaintiff California state income tax for the period of September 26 through December 31, of 1991 in a substantial amount. Moreover, the FTB also assessed a penalty against plaintiff in an amount almost equal to the assessed tax after summarily concluding that plaintiff's non-payment of the

assessed tax, based upon his asserted residency in Nevada and non-residency in California, was fraudulent.

17. Plaintiff, who demonstrably is and was at all times pertinent hereto, a bona fide resident of Nevada should not be forced into a California forum to seek relief from the unjust and tortious attempts by the FTB to extort unlawful taxes from this Nevada resident. Plaintiff avers that the manufactured issue of his residency in Nevada for the period of September 26 through December 31 of 1991 should be determined in Nevada, the state of plaintiff's residence. The FTB is in effect attempting to impose an "exit tax" on plaintiff by coercing him into administrative procedures and possible future court action in California. The FTB has arbitrarily, maliciously and without support in law or fact, asserted that plaintiff remained a California resident until he purchased and closed escrow on a new home in Las Vegas on April 3, 1992. In a word, the FTB's prolonged and monumental efforts to find a way – any way – to effectively assess additional income taxes against plaintiff after he changed his residency from California to Nevada is based on governmental greed arising from the FTB's eventual awareness of the financial success plaintiff has realized since leaving California and becoming a bona fide resident of the State of Nevada. The aforesaid date of Nevada residency accepted by the FTB with respect to the 1991 Report is over six months after plaintiff moved to Nevada with the intent to stay and began, he thought, to enjoy all the privileges and advantages of residency in his new state.

The FTB's Continuing Pursuit of Plaintiff in Nevada

18. On or about April 1, 1996, plaintiff received formal notice that the FTB had commenced an investigation into the 1992 tax year and that its tentative determination was that plaintiff would also be assessed California state income taxes for the period of January 1 through April 3 of 1992.

19. On or about April 10, 1997 and May 12, 1997 respectively, plaintiff received notices from the FTB that it would be issuing a formal "Notice of Proposed Assessment" in regard to the 1992 tax year in which it will seek back taxes from plaintiff for income earned during the period of January 1 through April 2, 1992 and in addition would seek penalties for plaintiff's failure to file a state income tax return for 1992.

20. Prior to the FTB sending the formal Notice of Proposed Assessment for the 1992 tax year, a representative of the FTB stated to one of plaintiff's representatives that disputes over such assessments by the FTB always settle at this stage as taxpayers do not want to risk their personal financial information being made public. Plaintiff understood this statement to be a strong suggestion by the FTB that he settle the dispute by payment of some portion of the assessed taxes and penalties. Plaintiff refused, and continues to refuse to do so, as he has not been a resident of California since his move to Nevada on September 26, 1991, and it remains clear to him that the FTB is engaging in its highhanded tactics to extort "taxes and penalties" from him that he does not legally or morally owe.

21. On or about August 14, 1997, plaintiff received a formal Notice of Proposed Assessment for 1992. Despite

the FTB's earlier written statements and findings that plaintiff became a Nevada resident at least as of April 3, 1992 and its statement in such Notice of Proposed Assessment that "we [the FTB] consider you to be a resident of this state [California] through April 2, 1992," such notice proceeded to assess California state income taxes on plaintiff's income for the entire year of 1992. Specifically, the FTB assessed plaintiff state income taxes for 1991 in amount five times greater than that for 1991, assessed plaintiff a penalty almost as great as the assessed tax for alleged fraud in claiming he was a Nevada resident during 1992, and stated that interest accrued through August 14, 1997 (roughly the equivalent of the penalty) was also owed on the assessed tax and penalty. In short, the State of California, through the FTB, sent plaintiff a bill for the entire 1992 tax year, which was fourteen times the amount of tax it initially assessed for 1991, and in so doing asserted that plaintiff was "a California resident for the entire year." Without explanation the FTB ignored its earlier finding and written acknowledgment that plaintiff was a Nevada resident at least as of April 3, 1992. This outrage is a transparent effort to extort substantial sums of money from a Nevada resident.

22. Plaintiff is informed and believes, and therefore alleges, that the FTB intends to engage in a repeat of the "hands on" extraterritorial investigations directed at plaintiff within the State of Nevada in an effort to conjure up a colorable basis for justifying its frivolous, extortionate Noticed of Proposed Assessment for the 1992 tax year.

23. Plaintiff is informed and believes, and therefore alleges, that the FTB may continue to assess plaintiff California state income taxes for the years 1993, 1994, 1995, 1996 and beyond since the FTB has now disregarded

its own conclusion regarding plaintiff's residency in Nevada as of April 3, 1992, and is bent on charging him with a staggering amount of taxes, penalties and interest irrespective of his status as a bona fide resident of Nevada. It appears from its actions concerning plaintiff, that the FTB has embraced a new theory of liability that in effect declares "once a California resident always a California resident" as long as the victim continues to generate significant amounts of income. Thus, the FTB has raised an invisible equivalent of the iron curtain that prohibits such residents from ever leaving the taxing jurisdiction of the FTB.

The FTB's Motive

24. Plaintiff is informed and believes, and therefore alleges, that the FTB has no credible, admissible evidence that plaintiff was a California resident at anytime after September of 1991, despite the FTB's exhaustive extraterritorial investigations in Nevada. The FTB has acknowledged in its own reports that plaintiff sold his California home on October 1, 1991, that plaintiff rented an apartment in Las Vegas from November 1991 until April 1992 and that plaintiff purchased a home in Las Vegas in April 1992.

25. Plaintiff is informed and believes, and therefore alleges, that the assessments by the FTB against plaintiff for 1991 and 1992 result from the fact that almost two years after plaintiff moved from California to Nevada an FTB investigator read a magazine article about plaintiff's wealth and the FTB thereafter launched its investigation in the hope of extracting a significant settlement from plaintiff. Plaintiff is further informed and believes, and

therefore alleges, that the FTB has assessed a fraud penalty against plaintiff for the 1991 tax year and issued a Notice of Proposed Assessment assessing plaintiff for the entire 1992 tax year and a fraud penalty for the same year to intimidate plaintiff and coerce him into paying some significant amount of tax for income earned after September 26, 1991, despite its awareness that plaintiff actually became a Nevada resident at that time. Plaintiff alleges that the FTB's efforts to coerce plaintiff into sharing his hard-earned wealth despite having no lawful basis for doing so, constitutes malice and oppression.

Jurisdiction

26. This Court has personal jurisdiction over the FTB pursuant to Nevada's "long-arm" statute, NRS 14.065 *et seq.*, because of the FTB's tortious extraterritorial contacts and investigatory conduct within the State of Nevada ostensibly as part of its auditing efforts to undermine plaintiff's status as a Nevada resident, but in reality to create a colorable basis for maintaining that plaintiff continued his residency in California during the period September 26, 1991 to December 31, 1991 and beyond.

27. Plaintiff is informed and believes, and therefore alleges, that the FTB has a pattern and practice of entering into Nevada to investigate Nevada residents who were formerly residents of California, and then assessing such residents California state income taxes for time periods subsequent to the date when such individuals moved to and established residency in Nevada.

FIRST CAUSE OF ACTION

(For Declaratory Relief)

28. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27 above, as though set forth herein verbatim.

29. Pursuant to California law, in determining whether an individual was a resident of California for a certain time period thereby making such individuals' income subject to California state income tax during such period, the individual must have been domiciled in California during such period for "other than a temporary or transitory purpose." *See* Cal. Rev. & Tax Code § 17014. The FTB's own regulations and precedents require that it apply certain factors in determining an individual's domicile and/or whether the individual's presence in California (or outside of California) was more than temporary or transitory.

(a) Domicile.

Domicile is determined by the individual's physical presence in California with intent to stay or if absent temporarily from California an intent to return. Such intent is determined by the acts and conduct of the individual such as: (1) where the individual is registered to vote and votes; (2) location of the individual's permanent home; (3) comparative size of homes maintained by the individual in different states; (4) where the individual files federal income tax returns; (5) comparative time spent by the individual in different states; (6) cancellation of the individual's California homeowner's property tax exemption; (7) obtaining a driver's license from

another state; (8) registering a car in another state; (9) joining religious, business and/or social organizations in another state; and (10) establishment of a successful business in an other state by an individual who is self employed.

(b) Temporary or Transitory Purpose.

The following contacts which are similar although not identical to those used to determine domicile are important in determining whether an individual was in California (or left California) for a temporary or transitory purpose: (1) physical presence of the individual in California in comparison to the other state or states; (2) establishment of a successful business in another state by an individual who is self employed; (3) extensive business interest outside of California and active participation in such business by the individual; (4) banking activity in California by the individual is given some, although not a great deal of, weight; (5) rental of property in another state by the individual; (6) cancellation of the individual's California homeowner's property tax exemption; (7) hiring professionals by the individual located in another state; (8) obtaining a driver's license from another state; (9) registering a car in another state; (10) joining religious, business and/or social organizations in another state; and (11) where the individual is registered to vote and votes.

30. The FTB's assessment of taxes and a penalty for 1991 is based on the FTB's conclusion in the first instance that plaintiff did not become a resident of Nevada until April 3, 1992, the date on which plaintiff closed escrow on a new home in Las Vegas. In coming to such a conclusion, the FTB discounted or refused to consider a multitude of

evidentiary facts which contradicted the FTB's conclusion, and were the type of facts the FTB's own regulations and precedents require it to consider. Such facts include, but are not limited to, the following: (1) plaintiff sold his California home on October 1, 1991; (2) plaintiff rented an apartment in Las Vegas on or about October 7, 1991 and, after a brief period of necessary travel to the east coast, took possession of said apartment on or about October 22, 1991 and maintained his residence there until April of 1992; (3) plaintiff registered to vote, obtained a Nevada driver's license (relinquishing his California driver's license to the Nevada Department of Motor Vehicles), and joined a Las Vegas religious organization in November of 1991; (4) plaintiff terminated his California home owner's exemption effective October 1, 1991; (5) plaintiff began actively searching for a house to buy in Las Vegas, commencing in early October 1991, and submitted numerous offers on houses in Las Vegas beginning in December 1991; (6) one of plaintiff's offers to purchase a home in Las Vegas was accepted in March of 1992 and escrow on the transaction closed on April 3, 1992; and (7) plaintiff's new home in Las Vegas was substantially larger than the home in Southern California, which he sold in October of 1991.

31. An actual controversy exists as to whether plaintiff was a full-time resident of Nevada – not California – commencing on September 26, 1991 through December 31, 1991 and continuing thereafter through the year 1992 and beyond. Plaintiff contends that under either Nevada or California law, or both, he was a full-time, bona fide resident of Nevada throughout the referenced periods and down to the present, and that the FTB ignored its own regulations and precedents in finding to the contrary, and that the FTB has no jurisdiction to impose a tax obligation

on plaintiff during the contested periods. Plaintiff also contends that the FTB had no authority to conduct an extraterritorial investigation of plaintiff in Nevada and no authority to propound "quasi-subpoenas" to Nevada residents and businesses, thereby seeking to coerce the cooperation of said Nevada residents and businesses through an unlawful and tortious deception, to reveal information about plaintiff. Plaintiff is informed and believes, and therefore alleges, that the FTB contends in all respects to the contrary.

32. Plaintiff therefore requests judgment of this Court declaring and confirming plaintiff's status as a full-time, bona fide resident of the State of Nevada effective from September 26, 1991 to the present; and for judgment declaring the FTB's extraterritorial investigatory excursions into Nevada, and the submission of "quasi-subpoenas" to Nevada residents without approval from a Nevada court or governmental agency, as alleged above, to be without authority and violative of Nevada's sovereignty and territorial integrity.

SECOND CAUSE OF ACTION

(For Invasion of Privacy – Unreasonable Intrusion Upon The Seclusion of Another)

33. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, and 29 through 31, above, as though set forth herein verbatim.

34. Plaintiff is informed and believes, and therefore alleges, that neighbors, businesses, government officials and others within Nevada with whom plaintiff has had and would reasonably expect in the future to have social or

business interactions, were approached and questioned by the FTB and defendants who disclosed or implied that plaintiff was under investigation in California, and otherwise acted in such a manner as to cause doubts to arise concerning plaintiff's integrity and moral character. Moreover, as part of the audit/investigation in regard to the 1991 Return, plaintiff turned over to the FTB highly personal and confidential information with the understanding that it would remain confidential. The FTB even noted in its own internal documentation that plaintiff had a significant concern in regard to the protection of his privacy in turning over such information. At the time this occurred, plaintiff was still hopeful that the FTB was actually operating in good faith, a proposition that, as noted throughout this complaint, proved to utterly false.

35. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants nevertheless violated plaintiff's right to privacy in regard to such information by revealing it to third parties and otherwise conducting an investigation in Nevada through which the FTB and defendants revealed to third parties personal and confidential information, which plaintiff had every right to expect would not be revealed to such parties.

36. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants' extensive probing and investigation of plaintiff, including their actions both occurring within Nevada and directed to Nevada from California, were performed with the intent to harass, annoy, vex, embarrass and intimidate plaintiff such that he would eventually enter into a settlement with the FTB concerning his residency during the disputed time periods and the taxes and penalties allegedly owed. Such conduct by the FTB and defendants did in fact harass, annoy, vex

and embarrass Hyatt, and syphon his time and energies from the productive work in which he is engaged.

37. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants through their investigative actions, and in particular the manner in which they were carried out in Nevada, intentionally intruded into the solitude and seclusion which plaintiff had specifically sought by moving to Nevada. The intrusion by the FTB and defendants was such that any reasonable person, including plaintiff, would find highly offensive.

38. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

39. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiffs' privacy was intentional, malicious, and oppressive in that such invasion was despicable conduct by the FTB and defendants entered into with a willful and conscious disregard of plaintiff's rights, and the efficacious intent to cause him injury. Plaintiff is therefore entitled to an award of punitive damages against the FTB and defendants in an amount sufficient to satisfy the purposes for which such damages are awarded.

THIRD CAUSE OF ACTION

(For Invasion of Privacy – Unreasonable Publicity Given To Private Facts)

40. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs

1 through 27, 29 through 31, and 34 through 37, above, as though set forth herein verbatim.

41. As set forth above, plaintiff revealed to the FTB highly personal and confidential information at the request of the FTB as an ostensible part of its audit and investigation into plaintiff's residency during the disputed time periods. Plaintiff had a reasonable expectation that said information would be kept confidential and not revealed to third parties and the FTB and defendants knew and understood that said information was to be kept confidential and not revealed to third parties.

42. The FTB and defendants, without necessity or justification, nevertheless disclosed to third parties in Nevada certain of plaintiff's personal and confidential information which had been cooperatively disclosed to the FTB by plaintiff only for the purposes of facilitating the FTB's legitimate auditing and investigative efforts.

43. As a direct, proximate, and foreseeable result of the FTB's aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

44. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion constituted despicable conduct by the FTB and defendants entered into with a willful and conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of punitive or exemplary damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

FOURTH CAUSE OF ACTION

(For Invasion of Privacy – Casting Plaintiff in a False Light)

45. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, and 41 and 42, above, as if set forth herein verbatim.

46. By conducting interviews and interrogations of Nevada residents and by issuing unauthorized "Demands to Furnish Information" as part of their investigation in Nevada of plaintiff's residency, the FTB and defendants invaded plaintiff's right to privacy by stating or insinuating to said Nevada residents that plaintiff was under investigation in California, thereby falsely portraying plaintiff as having engaged in illegal and immoral conduct, and decidedly casting plaintiff's character in a false light.

47. The FTB and defendants' conduct in publicizing its investigation of plaintiff cast plaintiff in a false light in the public eye, thereby adversely compromising the attitude of those who know or would, in reasonable likelihood, come to know Gil Hyatt because of the nature and scope of his work. Such publicity of the investigation was offensive and objectionable to plaintiff and was carried out for other than honorable, lawful, or reasonable purposes. Said conduct by the FTB and the defendants was calculated to harm, vex, annoy and intimidate plaintiff, and was not only offensive and embarrassing to plaintiff, but would have been equally so to any reasonable person of ordinary sensibilities similarly situated, as the conduct could only serve to damage plaintiff's reputation.

48. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

49. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion of privacy was despicable conduct by the FTB and defendants, entered into with a willful and conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

FIFTH CAUSE OF ACTION

(For the Tort of Outrage)

50. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, and 46 and 47, above, as if set forth herein verbatim.

51. The clandestine and reprehensible manner in which the FTB and defendants carried out their investigation in Nevada of plaintiff's Nevada residency under the cloak of authority from the State of California, but without permission from the State of Nevada, and the FTB and defendants' apparent intent to continue to investigate and assess plaintiff staggeringly high California state income taxes, interest, and penalties for the entire year of 1992 – and possibly continuing into future years – despite the FTB's own finding that plaintiff was a Nevada resident at least as of April of 1992, was, and continues to be, extreme,

oppressive and outrageous conduct. The FTB has, in every sense, sought to hold plaintiff hostage in California, disdaining and abandoning all reason in its reprehensible, all-out effort to extort significant amounts of plaintiff's income without a basis in law or fact. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants carried out their investigation in Nevada for the ostensible purpose of seeking truth concerning his place of residency, but the true purpose of which was to so harass, annoy, embarrass, and intimidate plaintiff, and to cause him such severe emotional distress and worry as to coerce him into paying significant sums to the FTB irrespective of his demonstrably bona fide residence in Nevada throughout the disputed periods. As a result of such extremely outrageous and oppressive conduct on the part of the FTB and defendants, plaintiff has indeed suffered fear, grief, humiliation, embarrassment, anger, and a strong sense of outrage that any honest and reasonably sensitive person would feel if subjected to equivalent unrelenting, outrageous personal threats and insults by such powerful and determined adversaries.

52. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned extreme, unrelenting, and outrageous conduct, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

53. Plaintiff is informed and believes, and therefore alleges, that said extreme, unrelenting, and outrageous conduct was intentional, malicious, and oppressive in that it was despicable conduct by the FTB and defendants, entered into with a willful and conscious disregard of plaintiff's rights. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient

to satisfy the purposes for which such damages are awarded.

SIXTH CAUSE OF ACTION

(For Abuse of Process)

54. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, 46 and 47, and 51 and 53, above, as if set forth herein verbatim.

55. Despite plaintiff's ongoing effort, both personally and through his professional representatives, to reasonably provide the FTB with every form of information it requested in order to convince the FTB that plaintiff has been a bona fide resident of the State of Nevada since September 26, 1991, the FTB has willfully sought to extort vast sums of money from plaintiff through administrative proceedings unrelated to the legitimate taxing purposes for which the FTB is empowered to act as an agency of the government of the State of California; said administrative proceedings have been lawlessly and abusively directed into the State of Nevada through means of administrative "quasi-subpoenas" that have been unlawfully utilized in the attempt to extort money from plaintiff as aforesaid.

56. The FTB, without authorization from any Nevada court or governmental agency, directed facially authoritative "DEMAND[S] TO FURNISH INFORMATION," also referred to herein by plaintiff as "quasi-subpoenas," to various Nevada residents, professionals and businesses, *requiring* specific information about plaintiff. The aforesaid "Demands" constituted an actionable

abuse of process with respect to plaintiff for the following reasons:

(a) Despite the fact that each such "Demand" was without force of law, they were specifically represented to be "Authorized by California Revenue & Taxation Code Section 19504 (formerly 19254(a) and 26423 (a)[ ])," sent out by the State of California, Franchise Tax Board on behalf of "The People of the State of California" to each specific recipient, and were prominently identified as relating to "*In the Matter of*: Gilbert P. Hyatt;" Plaintiff was also identified by his social security number, and in certain instances by his actual home address in violation of express promises of confidentiality by the FTB; although the aforesaid "Demands" were not directed to plaintiff, the perversion of administrative process which they represented was motivated by the intent to make plaintiff both the target and the victim of the illicit documents;

(b) Each such "Demand" was unlawfully used in order to further the effort to extort monies from plaintiff that could not be lawfully and constitutionally assessed and collected because plaintiff was a bona fide resident of Nevada throughout the periods of time the FTB has sought to collect taxes from him, and plaintiff has not generated any California income during any of the pertinent time periods;

(c) Each such "Demand" was submitted to Nevada residents, professionals, and businesses for the ulterior purpose of coercing plaintiff into paying extortionate sums of money to the FTB without factual or constitutional justification, and without the intent or prospect of resolving any legal dispute; indeed, as noted above, many of the

"Demands" were used as vehicles for publicly violating express promises of confidentiality by the FTB, thus adding to the pressure and anxiety felt by plaintiff as intended by the FTB in furtherance of its unlawful scheme;

(d) Although the FTB was allegedly investigating plaintiff for the audit years 1991 and 1992, such audits were and are a "sham" asserted for the purposes of attempting to extort non-owed monies from plaintiff, as demonstrated by the fact that several of the "Demands" indicated that they were issued to secure information (about plaintiff) "for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated," and then proceeded to demand information pertaining to the years 1993, 1994, and 1995 "to present;"

(e) Sheila Cox, a tax auditor for the FTB who has invested hundreds of hours in attempting to gain unlawful access to plaintiff's wallet through means of extortion, was the "Authorized Representative" who issued these abusive, deceptive and outrageous "Demands," and each of the "Demands" or quasi-subpoenas constituted legal or administrative process targeting plaintiff that was not proper in the regular conduct of the FTB's administrative proceedings against plaintiff;

(f) That each "Demand" was selectively, deliberately and calculatingly issued to Nevada recipients who Sheila Cox and the FTB thought would most likely respond to the authoritative nature and language of the documents, as opposed to courteous letters of inquiry that tax auditors and the FTB sent to certain governmental agencies and officials who were viewed as potential sources of criticism

or trouble if confronted with the deceptive attempt to exact [sic] sensitive information from them through means of facially coercive documents purporting to have extraterritorial effect based upon the authority of California law;

(g) In conjunction with and in addition to the issuance of the aforesaid "Demands," and the personal, investigative forays into Nevada by FTB agents, as detailed above, a representative of the FTB, Anna Jovanovich, stated to plaintiff's tax counsel, Eugene Cowan, Esq., that at this "stage" of the proceedings, these types of disputes involving wealthy or well-known taxpayers over their contested assessments almost always settle because these taxpayers do not want to risk having their personal financial information being made public, thus the "suggestion" by Ms. Jovanovich concerning settlement was made with the implied threat that the FTB would release highly confidential financial information concerning plaintiff if he refused to settle, another deceptive and improper abuse of the proceedings instigated by the FTB to coerce settlement by plaintiff;

(h) In conjunction with and in addition to the issuance of the aforesaid "Demands" and the other improper methods of exerting coercive pressure on plaintiff to pay the FTB money which it has sought to secure by extortion, and without justification in law or equity, the FTB compounded its abuse of its administrative powers by assessing plaintiff huge penalties based on patently false and frivolous accusations, including but not limited to, the concealment of assets to avoid taxes, plus the outrageous contention that plaintiff was fraudulently claiming Nevada residency;

(i) The FTB and Sheila Cox knew that they had no authority to issue **"DEMAND[S] TO FURNISH INFORMATION"** to any Nevada resident, business or entity, and that it was a gross abuse of Section 19504 of the California Revenue and Taxation Code, under which the aforesaid "Demands" were purportedly authorized; that the aforesaid section of the California Revenue and Taxation Code contains no provision that remotely purports to empower or authorize the FTB to issue such facially coercive documents to residents and citizens of Nevada in Nevada; and despite knowing that it was highly improper and unlawful to attempt to deceive Nevada citizens and businesses into believing that they were under a compulsion to respond to the "Demands" under pain of some type of punitive consequences, Sheila Cox and the FTB nevertheless deliberately and calculatingly abused the process authorized by the aforesaid section of the California Revenue and Taxation Code in order to promote their attempts to extort money from plaintiff;

(j) From the outset, the determination by Sheila Cox and the FTB to utilize the **"DEMAND[S] TO FURNISH INFORMATION"** in Nevada, constituted a deliberate, unlawful, and despicable decision to embark on a course of concealment in the effort to produce material, information, pressure and sources of distortion that would culminate in a combination of sufficient strength and adversity to force plaintiff to yield to the FTB's extortionate demands for money; and the course of concealment consisted of concealing from plaintiff the fact that the aforesaid "Demands" were being sent to Nevada residents, professional persons and businesses, and in hiding from the recipients of the "Demands" the fact that despite their stated support in

California law, the documents had no such support and were deceitful and bogus documents; and

(k) The FTB further abused its legal, administrative process by issuing the bogus quasi-subpoenas to Nevada residents, professionals, and businesses without providing plaintiff with notice of such discovery as required by the due process clause of Article I, Section 8 of the Nevada Constitution and the applicable Nevada Rules of Civil Procedure.

57. As a direct, proximate and foreseeable result of the FTB and defendants' intentional and malicious abuse of the administrative processes, which the FTB initiated and unrelentingly pursued against plaintiff, as aforesaid, plaintiff has suffered actual and consequential damages, including but not limited to fear, anxiety, mental and emotional distress in an amount in excess of $10,000.

58. Plaintiff is informed and reasonably believes, and therefore alleges, that said abuse of the administrative processes initiated and pursued against plaintiff was willful, intentional, malicious and oppressive in that it represented a deliberate effort to unlawfully extort substantial sums of money from plaintiff that could not be remotely justified by any honorable effort within the purview of the powers conferred upon the FTB by the State of California relating to all aspects of taxation, including the powers of investigation, assessment and collection. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes of which such damages are awarded.

SEVENTH CAUSE OF ACTION

(For Fraud)

59. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, 46 and 47, 51 and 53, 54 through 56, including subparagraphs (a) through (k) of the latter paragraph, above, as if set forth herein verbatim.

60. Plaintiff, who prior to September 26, 1991 had been a long-standing resident and taxpayer of the State of California, placed trust and confidence in the bona fides of the FTB as the taxing authority of the State of California when the FTB first contacted him on or about June 1993 regarding the 1991 audit of his California tax obligation; by the time of this first contact, plaintiff had become a recognized and prominent force in the computer electronics industry, and he was vitally interested in maintaining both his personal and business security, as well as the integrity of his reputation as a highly successful inventor and owner and licensor of significantly valuable patents.

61. During the course of seeking information and documents relating to the 1991 "audit," and repeatedly thereafter, the FTB absolutely promised to maintain in the strictest of confidence, various aspects of plaintiff's circumstances, including, but not limited to, his personal home address and his business and financial transactions and status; and plaintiff's professional representatives took special measures to maintain the confidentiality of plaintiff's affairs, including and especially obtaining solemn commitments from FTB agents to maintain in the strictest of confidence (assured by supposedly secure arrangements) all of plaintiff's confidential information

and documents; and the said confidential information and documents were given to the FTB in return for its solemn guarantees and assurances of confidentiality, as aforesaid.

62. Despite the aforesaid assurances and representations of confidentiality by the FTB, said assurances and representations were false, and the FTB knew they were false or believed they were false, or were without a sufficient basis for making said assurances and representations. Even as the FTB and its agents were continuing to provide assurances of confidentiality to plaintiff and his professional representatives, and without notice to either, Sheila Cox and the FTB were in the process of sending the bogus **"DEMAND[S] TO FURNISH INFORMATION"** to the utility companies in Las Vegas which demonstrated that the aforesaid assurances and representations were false, as the FTB revealed plaintiff's personal home address in Las Vegas, thus making this highly sensitive and confidential information essentially available to the world through access to the databases maintained by the utility companies. Specific representative indices of the FTB's fraud include:

(a) In a letter by Eugene Cowan, Esq., a tax attorney representing plaintiff, dated November 1, 1993 and addressed to and received by Mr. Marc Shayer of the FTB, Mr. Cowan indicated that he was enclosing a copy of plaintiff's escrow instructions concerning the purchase of his Las Vegas residence, and that "[p]er our discussion, the address of the Las Vegas home has been deleted." Mr. Cowan ended his letter with the following sentence: "As we discussed, the enclosed materials are highly confidential and we do appreciate your utmost care in maintaining our confidentiality." This letter is contained within the files of the FTB, and the FTB noted in its chronological list

of items, the receipt of the aforesaid escrow instructions with "Address deleted;"

(b) In the FTB's records concerning its Residency Audit of 1991 of Gilbert P. Hyatt, the following pertinent excerpts of notations exist:

(I) 2/17/95 – "[Eugene Cowan] wants us to make as few copies as possible, as he is concerned for the privacy of the taxpayer. I [the FTB agent] explained that we will need copies, as the cases often take a long time to complete and that cases which go to protest can take several years to resolve[;]"

(ii) 2/21/95 – "LETTER FROM REPRESENTATIVE MIKE KERN Earlier document request was transferred to Eugene Cowan due to the sensitive and confidential nature of documentation[;]"

(iii) 2/23/95 – "Meeting [between Sheila Cox and] . . . Eugene Cowan . . . Mr. Cowan stressed that the taxpayer is very worried about his privacy and does not wish to give us copies of anything. I [Sheila Cox] discussed with him our Security and Disclosure policy. He said that the taxpayer is fearful of kidnapping." [sic] This latter reference to "kidnaping" is a fabrication by Sheila Cox in an apparent effort to downplay in the FTB's records, the importance of plaintiff's privacy concerns as those of an eccentric or paranoid; in reality, the FTB, Sheila Cox and other FTB agents knew that plaintiff had genuine cause for being concerned about industrial espionage and other risks associated with the magnitude of plaintiff's position in the computer electronic industry;

(iv) On February 28, 1995, Eugene Cowan, Esq. sent a letter to Sheila Cox of the FTB enclosing copies of

various documents. He then stated: "As previously discussed with you and other Franchise Tax Board auditors, all correspondence and materials furnished to the Franchise Tax Board by the taxpayer are highly confidential. It is our understanding that you will retain these materials in locked facilities with limited access[;]" and

(v) 8/31/95 – In a letter sent to Eugene Cowan, Esq. by Sheila Cox on 8/31/95 regarding the 1991 audit, Cox stated: "The FTB acknowledges that the taxpayer is a private person who puts a significant effort into protecting his privacy[:]"

(c) Despite the meeting Sheila Cox had with Mr. Cowan on February 23, 1995, and Mr. Cowan's expression of plaintiff's concern for his privacy, and the explanation by Cox of the FTB's stringent Security and Disclosure policy (the violation of which may subject the offending FTB employee to criminal sanctions or termination); and despite Mr. Cowan's letter to Sheila Cox of February 28, 1995, discussing the highly confidential nature of "all correspondence and materials furnished to the Franchise Tax Board" and his and plaintiff's "understanding that you will retain these materials in locked facilities with limited access" (thereby again underscoring the understanding that all information and documents provided to the FTB would be confidential, including plaintiff's personal residence address), Sheila Cox sent a **"DEMAND TO FURNISH INFORMATION"** to the Las Vegas utility companies including Southwest Gas Corp., Silver State Disposal Service and Las Vegas Valley Water District, providing each such company with the plaintiff's personal home address, thereby demonstrating disdain for plaintiff, his privacy concerns and the FTB's assurance of confidentiality.

63. Plaintiff further alleges that from the very beginning of the FTB's notification to plaintiff and his professional representatives of its intention to audit his 1991 California taxes, express and implied assurances and representations were made to plaintiff through his representatives, that the audit was to be an objective inquiry into the status of his 1991 tax obligation; and that upon information and belief, based on the FTB's subsequent actions, the aforesaid representations were untrue, as the FTB and certain of its agents were determined to share in the highly successful produce of plaintiff's painstaking labor through means of truth-defying extortion. Indications of this aspect of the fraud perpetrated by the FTB include:

(a) Despite plaintiff's delivery of copies of documentary evidence of the sale of his California residence on October, 1, 1991 to his business associate and confident, Grace Jeng, to the FTB, the FTB has contended that the aforementioned sale was a sham, and therefore evidence of plaintiff's continued California residency and his attempt to evade California income tax by fraud;

(b) Plaintiff supplied evidence to the FTB that he declared his sale, and income and interest derived from the sale of his LaPalma, California home on his 1991 income tax return, factors that were ignored by the FTB as it concluded that since the grant deed on the home was not recorded until June, 1993, the sale was a sham, as aforesaid, and a major basis for assessing fraud penalties against plaintiff as a means of building the pressure for extortion;

(c) Plaintiff, aware of his own whereabouts and domicile, alleges that the FTB has no credible evidence,

and can indeed provide none, that would indicate that plaintiff continued to own or occupy his former home in La Palma, California which he sold to his business associate and confident, Grace Jeng on October 1, 1991;

(d) After declaring plaintiff's sale of his California home on October 1, 1991 a "sham," the FTB later declined to compare the much less expensive California home with the home plaintiff purchased in Las Vegas, Nevada (a strong indication favoring Nevada residency) stating that: "Statistics (size, cost, etc.) comparing the taxpayer's La Palma home to his Las Vegas home will not be weighed in the determination [of residency], as the taxpayer sold the **La Palma** house on 10/1/91 before he purchased the house in **Las Vegas** during April of 1992." (Emphasis added.); and

(e) The FTB's gamesmanship, illustrated in part, above, constituted an ongoing misrepresentation of a bona fide audit of plaintiff's 1991 tax year, a factor compounded egregiously by the quasi-subpoenas sent to Nevada residents, professionals and businesses without prior notice to plaintiff, and concerning which a number of such official documents indicated that plaintiff was being investigated from January 1995 to the present, all with the intent of defrauding plaintiff into believing that he would owe an enormous tax obligation to the State of California.

64. The FTB and its agents intended to induce plaintiff and his professional representatives to act in reliance on the aforesaid false assurances and representations in order to acquire highly sensitive and confidential information from plaintiff and his professional representatives, and place plaintiff in a position where he would be vulnerable to the FTB's plans to extort large sums of

money from him. The FTB was keenly aware of the importance plaintiff assigned to his privacy because of the danger of industrial espionage and other hazards involving the extreme need for security in plaintiff's work and place of residence. The FTB also knew that it would not be able to obtain (at least without the uncertain prospects of judicial intervention) the desired information and documents with which to develop colorable, ostensible tax assessments and penalties against plaintiff, without providing plaintiff and his professional representatives with solemn commitments of secure confidentiality.

65. Plaintiff, reasonably relying on the truthfulness of the aforesaid assurances and representations by the FTB and its agents, and having no reason to believe that an agency of the State of California would misrepresent its commitments and assurances, did agree both personally and through his authorized professional representatives to cooperate with the FTB and provide it with his highly sensitive and confidential information and documents; in fact, plaintiff relied on the false representations and assurances of the FTB and its agents to his extreme detriment.

66. Plaintiff's reasonable reliance on the misrepresentations of the FTB and its agents, as aforesaid, resulted in great damage to plaintiff, including damage of an extent and nature to be revealed only to the Court *in camera*, plus actual and consequential damages, including but not limited to fear, anxiety, mental and emotional distress, in a total amount in excess of $10,000.

67. The aforesaid misrepresentations by the FTB and its agents were fraudulent, oppressive and malicious. Plaintiff is therefore entitled to an award of exemplary or

punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

EIGHTH CAUSE OF ACTION

(For Negligent Misrepresentation)

68. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, 46 and 47, 51 and 53, 54 through 56, including subparagraphs (a) through (k) of the latter paragraph, and 60 through 65, above, as if set forth herein verbatim.

69. The FTB, in providing plaintiff and his professional representatives assurances of strict confidentially with respect to the sensitive and highly confidential information and documents it sought to obtain from plaintiff concerning, allegedly, its 1991 tax year audit of plaintiff, as detailed above, owed a duty to plaintiff to inform him that the FTB, through its agents, may not have been able to maintain, or otherwise would not maintain, the strict confidentiality it had promised plaintiff in order to secure confidential information and documentation from him.

70. When the FTB revealed to public sources and third persons the highly sensitive and confidential information and documentation it had promised to retain under conditions of strict confidentiality, it breached its duty to plaintiff as described in paragraph 68, above.

71. The relationship between the FTB and plaintiff, was in every sense one of business and trust, as plaintiff was required to employ professional tax attorneys and accountants in order to deal with the FTB's demands, and

the FTB's interest was in determining means and methods whereby it could secure revenue from plaintiff. Although plaintiff was forced to deal with the FTB as a matter of law, it was clear that the asserted purpose for the mutual intercourse was a determination as to whether plaintiff may have owed additional taxes for calendar year 1991 for which he had enjoyed the benefits provided to him by the State of California. The negotiations that occurred between plaintiff, through his professional representatives, and the FTB and its agents, over terms under which information and documentation would be made available to the FTB were also part of what must assuredly be viewed as a business relationship.

72. As a direct, proximate and foreseeable result of the FTB's breach of duty to plaintiff, as alleged above, plaintiff has sustained great damage, including damage of an extent and nature to be revealed only to the Court *in camera*, plus actual and consequential damages, including but not limited to fear, anxiety, mental and emotional distress, in a total amount in excess of $10,000.

WHEREFORE, plaintiff respectfully prays for judgment against the FTB and defendants as follows:

FIRST CAUSE OF ACTION

1. For judgment declaring and confirming that plaintiff is a bona fide resident of the State of Nevada effective as of September 26, 1991 to the present;

2. For judgment declaring that the FTB has no lawful basis for continuing to investigate plaintiff in Nevada concerning his residency between September 26, 1991 through December 31, 1991 or any other subsequent period down to the present, and declaring that the FTB

had no right or authority to propound or otherwise issue a "Demand to Furnish Information" or other quasi-subpoenas to Nevada residents and businesses seeking information concerning plaintiff;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

SECOND CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

THIRD CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys fees; and

5. For such other and further relief as the Court deems just and proper.

FOURTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys fees; and

5. For such other and further relief as the Court deems just and proper.

FIFTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

SIXTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

SEVENTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

EIGHTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For costs of suit;

3. For reasonable attorneys' fees; and

4. For such other and further relief as the Court deems just and proper.

DATED this 11th day of June 1998.

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Supreme Court, U.S.
FILED
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No. 02-42

IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT AND EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada

BRIEF IN OPPOSITION FOR RESPONDENT GILBERT P. HYATT

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CONSTITUTIONAL PROVISION

United States Constitution, Article IV, Section 1 .. *passim*

IN THE

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No. 02-42

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT AND EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada

BRIEF IN OPPOSITION FOR RESPONDENT GILBERT P. HYATT

STATEMENT

This case arises out of a tort suit brought by respondent Hyatt, a Nevada citizen, in Nevada state court against petitioner Franchise Tax Board of the State of California (the "Board"). Among various defenses, the Board asserted that the Full Faith and Credit Clause, U.S. Const. Art. IV, § 1, compelled the Nevada courts to apply California law to the claims, in particular California law that purportedly shields the Board from liability for both negligent and intentional torts. The state district court elected to apply Nevada law. On appeal, the Nevada Supreme Court decided, on grounds of comity, to apply California law to the negligence claim, Pet. App. 11-12, but declined to apply California law to the intentional tort claims. Pet. App. 12-13. Noting that Nevada law does not shield Nevada officials from liability for intentional torts, the court

concluded that application of California law to deny redress to injured Nevada plaintiffs would "contravene Nevada's policies and interests in this case." Pet. App. 12.

The evidence introduced at the summary judgment stage showed that Board officials went well beyond typical investigative measures in an effort to extract additional tax revenues from respondent. The underlying tax dispute—which is still proceeding in California (Pet. 3)—turns on the date that respondent, a former California resident, became a permanent resident of Nevada. Seeking to establish a later date than respondent had submitted (and thus to extend the period during which respondent would have been a California citizen subject to California tax liability),[1] Board officials engaged in numerous tortious acts, including disclosures of private information about respondent to third parties, despite prior written and oral assurances that they would not do so. *See, e.g.*, Cowan Affidavit at 3-11 (Hyatt Appendix, Vol. VIII, Exh. 15); Depo. Exh. 101 (Franchise Tax Board audit file) at H01473, H01505, H01637 (Supp. Hyatt Appendix, Vol. X, Exh. 28). Furthermore, they carried out direct invasions of respondent's personal privacy, including efforts to look through mail and trash at his Nevada home. *See* Deposition of Candace Les at 269, 405 (Hyatt Appendix, Vol. VII, Exh. 11) (Les Deposition).

The conduct of one Board auditor, in particular, was extraordinary. This auditor, referring to respondent, declared that she was going to "get that Jew bastard." Les deposition at 10 (Supp. Hyatt Appendix, Vol. XIV, Exh. 49). According to

[1] In its petition, the Board seeks to give the impression that the 1991 income in dispute amounts to "$40 million." Pet. 3. In fact, the figure is less than half that ($17,727,743). *See* Cowan Affidavit Exh. 16 (Hyatt Appendix, Vol. VIII, Exh. 15) (Notice of Proposed Assessment).

"Hyatt Appendix" refers to appendices submitted to the Nevada Supreme Court in connection with the first petition for a writ of mandamus. "Supp. Hyatt Appendix" refers to the additional appendices submitted in connection with the second petition.

evidence from a former Board employee, the auditor freely discussed information about respondent—much of it false—including, among other things, details about members of his family, his battle with colon cancer, his girlfriend, and the murder of his son. *See, e.g.*, Les Deposition at 176, 255, 389, 391 (Supp. Hyatt Appendix, Vol. XIV, Exh. 49). At one point, she took the employee to respondent's Nevada home and photographed her standing in front of it. *See* Les Deposition at 42, 264, 402-03 (Supp. Hyatt Appendix, Vol. XIV, Exh. 49). Her incessant discussion of the investigation eventually led the employee to conclude that she had "created a fiction" about respondent and was "obsessed" with the case. *See* Les Deposition at 59-60, 61-63, 167-68 (Supp. Hyatt Appendix, Vol. XIV, Exh. 49).

Respondent brought suit against the Board in Nevada state court, alleging both negligent and intentional torts. The Board then sought summary judgment, arguing, *inter alia*, that the Full Faith and Credit Clause required the Nevada courts to apply California law and that, as a result, the Board was immune from liability for all claims. The Nevada district court rejected this defense, as well as defenses of sovereign immunity and comity, without opinion.

The Nevada Supreme Court affirmed in part and reversed in part.[2] With respect to the one negligence claim, the court decided that "the district court should have refrained from exercising its jurisdiction . . . under the comity doctrine . . . ." Pet. App. 11. While the court said that "Nevada has not expressly granted its state agencies immunity for all negligent acts," Pet. App. 12, it noted that "Nevada provides its agencies

[2] The Nevada Supreme Court initially granted a writ of mandamus directing the district court to enter summary judgment in favor of the Board, Pet. App. 38-44, concluding that respondent had not presented sufficient evidence to support his claims. Upon rehearing, the court vacated that order, Pet. App. 7, and entered the judgment now being challenged by the Board in its petition.

with immunity for the performance of a discretionary function even if the discretion is abused." Pet. App. 12. It thus concluded that "affording Franchise Tax Board statutory immunity [under California law] for negligent acts does not contravene any Nevada interest in this case." Pet. App. 12.

The Nevada Supreme Court declined, however, to apply California immunity law to the intentional tort claims. With respect to the Full Faith and Credit Clause argument, the court first observed that "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." Pet. App. 10. It then determined that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." Pet. App. 12. The court pointed out that "Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment." Pet. App. 12. Against this background, the court declared that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." Pet. App. 12-13.

ARGUMENT

There is no need for further review in this case. The Nevada Supreme Court, in rejecting the Full Faith and Credit Clause argument made by the Board, did nothing more than correctly apply a well-established constitutional standard to a particular set of facts. The petition should be denied.

A. The sole argument advanced by the Board is that the Full Faith and Credit Clause compels Nevada courts to apply California law—in particular, its law of sovereign immunity—to the intentional tort claims brought by respondent.[3] But this

[3] The Board has not made, and the Question Presented does not encompass, any sovereign immunity argument separate and apart from its argument that the Full Faith and Credit Clause required Nevada courts to apply California immunity law. In particular, the Board does not contend that it is shielded by inherent sovereign immunity, a defense that, in any event, this Court has declined to recognize as binding on the courts of a sister State. *See Nevada v. Hall*, 440 U.S. 410, 416 (1979); *see also Alden v. Maine*, 527 U.S. 706, 738-39 (1999).

Court has repeatedly made clear that a forum State, having sufficient contacts with the lawsuit, need not apply the law of another State when to do so would offend its own public policy. *See Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232-33 (1998); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-19 (1985); *Nevada v. Hall*, 440 U.S. 410, 422 (1979); *Carroll v. Lanza*, 349 U.S. 408, 412 (1955); *Pacific Employers Ins. Co. v. Industrial Accident Commission of California*, 306 U.S. 493, 501-05 (1939).[4] The general rule is straightforward: "[t]he Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" *Baker by Thomas*, 522 U.S. at 232 (quoting *Pacific Employers*, 306 U.S. at 501). More particularly, "the Full Faith and Credit Clause does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy." *Carroll v. Lanza*, 349 U.S. at 412. Although a stricter rule applies with respect to *judgments, see Baker by Thomas*, 522 U.S. at 232-34, the Court has stressed that the Full Faith and Credit Clause applies with significantly less force to state *laws, id.*, stating flatly that the Clause does not "enable one state to legislate for

[4] A State must demonstrate that its contacts with the litigation are sufficiently extensive that "'choice of its law is neither arbitrary nor fundamentally unfair.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 818 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) (plurality opinion)). Given that respondent is a Nevada resident, and that the acts at issue occurred in (or caused harm in) Nevada, that standard is easily satisfied here.

the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Pacific Employers*, 306 U.S. at 504-05.

The Court has applied this principle, without variation, even when the law at issue would provide sovereign immunity to a defendant State. *See Nevada v. Hall*, 440 U.S. at 421-24. Although acknowledging that "in certain limited situations, the courts of one State must apply the statutory law of another State," *id.* at 421, the Court in *Hall* went on to emphasize that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Id.* at 422. In that case, the California courts had chosen to apply California law, providing full redress for injuries incurred within its borders, despite efforts by Nevada to invoke the defense of sovereign immunity under Nevada law. *See id.* at 421-24. This Court upheld that decision, noting that California had a "substantial" interest in granting relief to injured persons. *See id.* at 424 (quoting App. to Pet. for Cert. vii) ("California's interest is the . . . substantial one of providing 'full protection to those who are injured on its highways through the negligence of both residents and nonresidents'").

The Nevada Supreme Court simply applied these familiar principles to this case. It first recognized that, under the recognized standard, "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." Pet. App. 10. Then, having invoked the doctrine of comity to order summary judgment for the Board on the negligence claim, Pet. App. 11-12, it declined to order summary judgment on the intentional tort claims, stating that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." Pet. App. 12. More particularly, it concluded that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts

committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." Pet. App. 12-13.

There is no serious question that the Nevada policy—redressing injury from intentional torts—is both genuine and significant. *See Nevada v. Hall*, 440 U.S. at 424. Indeed, like California in *Hall* (*id.*), Nevada has even chosen to subject its own officials to suit for comparable malfeasance. *See* Pet. App. 12 ("Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment"). In short, therefore, Nevada has made a deliberate policy choice that it will open its courts to persons injured as a result of intentional torts, even when the injury results from the acts of state employees. Nothing in the Full Faith and Credit Clause requires the State to subordinate that policy to the contrary policy of another State.

B. The Board does not address—indeed, does not even mention—this body of established law under the Full Faith and Credit Clause. Instead, its entire argument is that a footnote in *Nevada v. Hall*, 440 U.S. at 424 n.24, calls for a different analysis and that state courts are thus in need of guidance about the proper standard. Neither part of this argument is correct.

To begin with, the Board is making too much of footnote 24. In that footnote the Court merely noted that the action of the forum State (California) in applying its own law "pose[d] no substantial threat to our constitutional federalism" and "could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities," *id.*, adding that it "ha[d] no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result." *Id.* Although the Court did not elaborate, this language seems to do nothing more than leave open the future possibility of applying a balancing test, as the Court had done in a few prior Full Faith and Credit Clause

cases, pursuant to which the Court might weigh the respective State interests. *See Alaska Packers Ass'n v. Industrial Accident Commission of California*, 294 U.S. 532, 547 (1935) (conflict to be resolved "by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight"); *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 73 (1954). That *dictum*, however, is of little use to the Board at this point. It is clear by now, if it was not when *Nevada v. Hall* was decided, that the Court no longer employs a balancing test as part of its Full Faith and Credit Clause analysis. Five Justices of this Court expressly said so in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), decided just two years after *Nevada v. Hall*, with the plurality of four Justices observing: "Although at one time the Court required a more exacting standard under the Full Faith and Credit Clause than under the Due Process Clause for evaluating the constitutionality of choice-of-law decisions, . . . the Court has since abandoned the weighing-of-interests requirement." 449 U.S. at 308 n.10 (plurality opinion), citing *Carroll v. Lanza*, *supra*; *Nevada v. Hall*, *supra*; *see also id.* at 322 n.6 (Stevens, J., concurring in the judgment) ("as noted in the plurality opinion . . . the Court has since abandoned the full faith and credit standard represented by *Alaska Packers*"). And, in the years since, the Court has adhered to the standard applied in the text of *Nevada v. Hall*—*i.e.*, that a forum State need not apply foreign law in derogation of its own legitimate public policy—without requiring the State to demonstrate that its policy interest predominates over the conflicting policy of another State. *See, e.g., Sun Oil Co. v. Wortman, supra.*

The Board certainly offers no reason to resurrect the abandoned "balancing" approach. In the first place, any attempt to weigh State interests, by its very nature, puts state and federal courts in the uncomfortable position of having to assess and value different competing public policies whenever multiple States claim to have an interest in a particular lawsuit.

Moreover, as the final authority with respect to applications of the Full Faith and Credit Clause, it would ultimately fall to this Court to pick and choose among those various interests, without the benefit of any reliable means for determining which State interest is, in fact, more important. This case provides a ready example: one State (Nevada) has decided that recovery for injuries should prevail over defenses of sovereign immunity, while another State (California) has ostensibly made the opposite choice. On what ground can it be said that, in Nevada courts, California law must be paramount?

Although the Board plainly believes that the Court should modify its Full Faith and Credit Clause standard in order to protect state sovereignty, that argument ignores several important factors. Most obviously, it gives no regard to the fact that a more intrusive Full Faith and Credit Clause doctrine would diminish the sovereignty of the *forum State*, denying it the right to establish the governing law for "persons and events within it." *Carroll v. Lanza*, 349 U.S. at 412. Furthermore, it fails to recognize that forum States, applying the existing standard, are highly unlikely to allow prosecution of suits that would seriously impede necessary governmental activity. Even a State that allows some suits against its own officials will typically provide sovereign immunity for actions integral to proper government operations. *See* Pet. App. 11-12 (discussing immunity of Nevada officials for discretionary acts). Thus, as in the case of the negligence claim here, *id.*, it may be expected that courts of that State will seek to accommodate officials of a sister State claiming similar protection under their own state law.

It is also doubtful that liability for intentional torts, especially torts committed against the small minority of audited non-resident taxpayers, will impede any legitimate efforts to enforce state tax laws. To state the obvious, proper tax collection does not require the sort of conduct engaged in by the Board here. While the Board refers to the "core sovereign function of state

tax enforcement," Pet. 9, it does not explain why this "core sovereign function" calls for actions that (in the case of one official, at least) amounted to something akin to a personal vendetta.[5] And, to the extent that the Board is concerned about potential liability for mere mistakes or misjudgments, it has already been accorded protection for those actions under the doctrine of comity. *See* Pet. App. 12. The policy concerns expressed by the Board are thus considerably overblown.

Finally, the two state court cases cited by the Board fall far short of demonstrating confusion with regard to the governing standard under the Full Faith and Credit Clause. *See Guarini v. State*, 521 A.2d 1362 (N.J. Super. 1986), *aff'd*, 521 A.2d 1294, *cert. denied*, 484 U.S. 817 (1987); *Xiomora Mejia-Cabral v. Eagleton School*, 1999 WL 791957 (Sept. 16, 1999) (Mass. Super). Although both courts read footnote 24 in *Nevada v. Hall* quite broadly, the fact is that neither case ultimately turned on that reading. In *Xiomora Mejia-Cabral*, the Massachusetts court recognized sovereign immunity for Connecticut as a matter of comity. *See* 1999 WL 791957 at *3-*4. Noting that Massachusetts had retained its own sovereign immunity against similar lawsuits, *id.* at *3, the court concluded that there was "no policy of this state that would be undermined by respecting the terms and conditions on which Connecticut has waived its sovereign immunity." *Id.* at *4. In *Guarini*, the New Jersey court dismissed various claims against New York on four separate grounds—exclusive jurisdiction, sovereign immunity, comity, and lack of standing—without even referring to the Full Faith and Credit Clause, much less indicating a need for further guidance about how to proceed under its provisions. *See* 521 A.2d at 1364-71. These cases thus demonstrate that forum

[5] The Board appears to acknowledge that, even under California law, state officials may be held responsible for some unlawful actions with respect to tax enforcement. *See* Pet. 7-8 and note 3.

States are fully able to identify cases in which recognition of sovereign immunity, or other like defenses, for a sister State is appropriate.

What the Board ultimately refuses to accept in this case is that Nevada, the forum State, is acting as a co-equal sovereign. As such, it has its own sovereign interests in assuring redress for persons within its jurisdiction. *See Nevada v. Hall*, 440 U.S. at 426. As a sovereign itself, of course, the State of California may seek to find common ground with the State of Nevada regarding issues of liability and reciprocity. *Id.* It may not, however, simply elevate its own law over the law of its sister State by means of a flawed interpretation of the Full Faith and Credit Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 02-42

In The
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT AND THE EIGHTH JUDICIAL
DISTRICT COURT OF THE STATE OF NEVADA,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Nevada

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

In its Petition for Writ of Certiorari, the California Franchise Tax Board (Board) sought review of the order of the Nevada Supreme Court that refused to extend full faith and credit to California's statutory scheme that provides broad sovereign immunity to state agencies, officials and employees administering California's tax laws. The Board argued that *Nevada v. Hall*, 440 U.S. 410, 424 n.24, *reh'g denied*, 441 U.S. 917 (1979), suggested that in cases such as this case – where the order of the Nevada Supreme Court crippled California's capacity and ability to perform one of its core, critical sovereign functions, the enforcement of California's personal income tax law – even differing state policies would not justify denying full faith and credit to a sister State's body of law. The Board also argued that the States need guidance in the interpretation and application of the full faith and credit analysis in *Nevada v. Hall*.

In response, respondent Hyatt argued that the writ should be denied because a forum State need not extend full faith and credit where it has sufficient contacts with the lawsuit. Hyatt also argued that the Court has completely abandoned the use of a balancing test as part of its full faith and credit analysis. Finally, Hyatt argued that the States need no guidance from the Court on this issue. Hyatt is wrong on all counts.

ARGUMENT

I. Contrary to respondent's claim, the Full Faith and Credit Clause affords protection to non-forum sister States in resolving choice of law questions involving critical, core governmental functions.

Respondent's brief argues that the Full Faith and Credit Clause does not afford protection to non-forum sister States in resolving choice of law questions involving critical, core governmental functions. California and at least 37 other States and Territories have explicitly disagreed.

Respondent claims that a forum State, having sufficient contacts with the lawsuit, need not apply the law of another State when to do so would offend its own public policy without regard to the relative importance of the non-forum State's governmental function involved or the extensiveness of the contact between the forum and non-forum States.

Respondent also contends that the Court has abandoned any consideration of the relative importance of the governmental function and contact with the forum State in resolving these critical choice of law questions.

A. Despite the fact that a forum State has sufficient contacts with a lawsuit, it still must extend full faith and credit to the laws of a sister State engaged in core, critical sovereign functions.

Respondent's arguments are in part based on his interpretation of *Nevada v. Hall*, 440 U.S. 410 (1979), and in part by his reliance on a series of cases involving

actions between private parties. These cases between private parties are inapplicable because they do not involve the constitutional issue framed by footnote 24 in *Nevada v. Hall*. *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232-33 (1998), involved a personal injury lawsuit between private parties. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 733 (1988), and *Phillips Petroluem Co. v. Shutts*, 477 U.S. 797, 818-19 (1985), concerned private class actions over oil royalties. *Carroll v. Lanza*, 349 U.S. 408, 412 (1955), and *Pacific-Employers Ins. Co. v. Industrial Accident Commission of California*, 306 U.S. 493, 501-505 (1939), considered the issue of workmen's compensation amongst private parties. *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 308 (1981), involved a wrongful death dispute between private parties.

Although *Nevada v. Hall* was a suit against a State, rather than exclusively between private parties, its result is also inapplicable here because it did not involve a State's exercise of a core, critical sovereign function. *Nevada v. Hall* revolved around a traffic accident by a Nevada state employee involving serious and substantial personal injuries that occurred on a public highway in California rather than the performance of a governmental function as this case does, a difference *Nevada v. Hall* recognized as potentially implicating different questions. In the case presently before the court, the auditor was the sole official of the Board charged with confirming respondent's claim of California non-residency status for California personal income tax purposes, a core, critical state function.[1]

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[1] Respondent seeks to influence and prejudice the Court against granting the Board's petition for certiorari by quoting and relying on

(Continued on following page)

Moreover, respondent's argument seeks to extend Nevada's judicial authority beyond its jurisdictional borders and to affect governmental policies and action elsewhere by exposing public agencies, officials and employees having no contact with the forum State to its judicial scrutiny and authority. Under respondent's argument official conduct that occurred exclusively in the non-forum State, and which was legal and immune from civil suit in the non-forum State at the time it occurred, would nonetheless be actionable in the forum State so long as it had an effect in the forum State.

B. Contrary to respondent's claim, use of a balancing test is called for where the non-forum State is engaged in core, critical sovereign functions.

Respondent claims that five Justices of this Court expressly disapproved the use of a balancing test in choice of law disputes under the Full Faith and Credit Clause in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981). The Board disagrees with that interpretation of *Allstate*.

As with the cases respondent relied upon above, *Allstate* deals only with private party litigants and does

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the testimony of a disgruntled former Board employee, Candace Les, who claims one of the Board auditors, Sheila Cox, was prejudiced against Hyatt because he is Jewish. Ms. Les was the subject of termination proceedings by the Board prior to the initiation of this lawsuit *and* the auditor *in question, Ms. Cox,* was the primary witness against her. See Board Response To Errata at 2. In any event, *neither* Candace Les nor Ms. Cox *made* the decision to audit respondent or the decision to issue a Notice of Proposed Assessment. See Illia Aff. ¶ 2, Cox Aff. ¶ 36 (Board Appendix Exh. 8).

not implicate the same constitutional concerns that are present here. Therefore, to the extent that *Allstate* establishes a rule disapproving use of a balancing test, the rule does not apply here. More importantly, however, Justice Stevens explicitly recognized in his concurring opinion in *Allstate* that the competing interests of the forum and non-forum States must be balanced to avoid infringement upon a State's sovereignty. "The Full Faith and Credit Clause implements this design by directing that a State, when acting as a forum for litigation having multistate aspects or implications, *respect the legitimate interests of other States* and avoid infringement upon their sovereignty." *Allstate Insurance Co. v. Hague*, 449 U.S. at 322 (Stevens, J., concurring). Justice Stevens amplified on this in *Allstate* when he explained that full faith and credit must be extended to prevent one State from imposing a policy that is hostile to another State's public acts:

> The kind of state action the Full Faith and Credit Clause was designed to prevent has been described in a variety of ways by this Court. In *Carroll v. Lanza*, 349 U.S. 408, 413 (1955), the Court indicated that the Clause would be invoked to restrain "any policy of hostility to the public Acts" of another State. In *Nevada v. Hall*, *supra*, at 424, n.24, we approved action which "pose[d] no substantial threat to our constitutional system of cooperative federalism." And in *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980), the plurality opinion described the purpose of the Full Faith and Credit Clause as the prevention of "parochial entrenchment on the interests of other States."

Allstate Insurance Co. v. Hague, *supra*, 449 U.S. at 323, n.10 (Stevens, J., concurring). Certainly the language that Justice Stevens used, "restrain 'any policy of hostility to

the public Acts' of another State," and the prevention of "parochial entrenchment on the interests of other States," makes it clear that a balancing test is still appropriately used in some cases, and the Board believes that such a test must be used in this case.

Respondent's brief dramatically underscores the constitutional confrontation presented by this case which goes to the very core of cooperative federalism, an issue not present at all in *Allstate*. The issue presented to the Court in this case raises numerous important constitutional questions. Is the Full Faith and Credit Clause of the United States Constitution the appropriate vehicle for resolving confrontations between and among the States over the application of choice of law questions? May a forum State extend its judicial authority beyond its geographic borders to affect the governmental policies and actions of another State thereby exposing the public officials of the non-forum State, who have little or no contact with the forum State, to its judicial scrutiny and authority? Do cooperative federalism and the need to prevent conflicts between the States require that the judicial authority of one State with respect to the governmental actions of another State be tempered by the Full Faith and Credit Clause? Are the limitations on choice of law questions especially and uniquely important to our constitutional structure in situations where the forum State, as it does here, admits that substantially all the conduct of another State that gives rise to the conflict occurred in the non-forum State? None of these questions were answered in *Allstate*; they are questions that under our constitution only this Court can answer and the answer is needed now.

Moreover, footnote 10 in *Allstate* [449 U.S. at 323], upon which respondent relies, itself cites *Nevada v. Hall*. Thus, as this Court did in *Nevada v. Hall*, the Court in *Allstate* implicitly left open the same question of revisiting the Full Faith and Credit Clause analysis when choice of law questions involving core sovereign functions are at issue.

In addition, applying respondent's view of full faith and credit to the present situation is at odds with the generally accepted view that the purpose of the Full Faith and Credit Clause was to alter the States' status as completely independent sovereigns.

Justice Scalia explained the role of the Full Faith and Credit Clause in *Sun Oil Co. v. Wortman*, where he explained the statement in *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 276-277 (1935) regarding choice of law jurisprudence: "The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties." Thus:

> This statement is true, as the context of the statement in Milwaukee County makes clear, not because the clause itself radically changed the principle of conflicts law but because it made conflicts principles enforceable as a matter of constitutional command rather than leaving the enforcement to the vagaries of the forum's view of comity. See *Estin v. Estin*, 334 U.S. 541, 546 (1948) (the Full Faith and Credit Clause "substituted a command for the earlier principles of comity and *thus* basically altered the status of the States as independent sovereigns"). . . .

Sun Oil Co. v. Wortman, 486 U.S. at 723-24, n.1; emphasis and parentheses in original.

Justice Stevens in *Allstate* also explained that:

> The Full Faith and Credit Clause is one of several provisions in the United States Constitution designed to transform the several States from independent sovereigns into a single, unified Nation.

Allstate Insurance Co. v. Hague, 449 U.S. at 322 (Stevens, J., concurring).

II. The States do need guidance in applying *Nevada v. Hall*.

Respondent contends that "forum states, applying the existing standard, are highly unlikely to allow prosecution of suits that would seriously impede necessary government activity." RB 9. Respondent also claims "that forum states are fully able to identify cases in which recognition of sovereign, or other like defenses, for a sister state is appropriate." RB 11. However, the problem here is that a forum State *has* failed to recognize an appropriate defense; thus, precisely that which respondent claims is unlikely to occur has, in fact, occurred. Respondent admits that he is challenging official conduct by Board officials *administering California's tax laws*, conduct that occurred almost exclusively in California. The Nevada Supreme Court originally found that "the myriad of depositions and documents submitted to the court are undisputed and indicate that Franchise Tax Board's investigative acts were in line with a standard to determine residency status for taxation pursuant to its statutory authority." Pet. App. 42-43. The Nevada district court observed that ninety-five percent of the conduct complained about occurred outside the forum State of Nevada. Pet. App. Ex. 17. Yet, despite

these uncontradicted facts, the Nevada Supreme Court has allow respondent to proceed under Nevada law when existing California law would provide the Board with broad immunities.[2] In this case the unexpected has occurred and only this Court can respond to it.

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[2] The Nevada district court has also allowed respondent unfettered freedom in discovery, allowing almost unlimited and draconian discovery measures affecting administrative tax and governmental records and public employees, often in contravention of existing California law. This includes sealing the court file and the imposing of an oppressive protective order designed to keep the proceeding behind a wall of secrecy. See Board Response To Errata at 2.

CONCLUSION

Based on the foregoing reasons, petitioner respectfully requests this Court to grant the Board's petition.

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FRANCHISE TAX BOARD
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THE NEVADA SUPREME COURT,
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and

GILBERT P. HYATT,
Real Party in Interest.

On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada

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Brief *Amicus Curiae* of Multistate Tax Commission in Support of Petitioner

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In Memoriam

Paull Mines[1]

August 27, 1942 – August 29, 2002

[1] This brief is the last that will bear the imprint of Paull's name, but not, we trust, the impact of his mind. Our brilliant, warm counselor guided us all at the Multistate Tax Commission as he guided the Court, *see, e.g., Wisconsin Dept. of Revenue v. Wrigley Co*, 505 U.S. 214, 228-229 (1992). He will be remembered for many reasons, including his advocacy of the font Bookman Old Style.

Question Presented (Additional)

Does the exception to Eleventh Amendment sovereign immunity recognized in *Nevada v. Hall*, 440 U.S. 410 (1979) extend to the core state sovereignty power to impose tax?

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BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER[2]

INTEREST OF *AMICUS CURIAE*

The Multistate Tax Commission is the administrative agency of the MULTISTATE TAX COMPACT. *See* RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 657 (2001). Twenty-one States have legislatively established full membership in the COMPACT. In addition, five States are sovereignty members and sixteen States are associate members.[3] The Court upheld the validity of the COMPACT in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978), including its authority to conduct joint audits on behalf of its member States.[4]

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[2]No counsel for any party authored this brief in whole or in part. Only *Amicus* Multistate Tax Commission and its member States through the payment of their membership fees made any monetary contribution to the preparation or submission of this brief. Finally, this brief is filed pursuant to the consent of the parties.

[3] The COMPACT parties are Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. The Sovereignty members are Florida, Kentucky, Louisiana, New Jersey and Wyoming. The Associate members are Arizona, Connecticut, Georgia, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, West Virginia and Wisconsin.

[4] Congress has recognized the Commission's role in simplifying state taxation of interstate commerce. Mobile Telecommunications Sourcing Act, Pub. Law 106-252, 114 STAT. 626, 628 and 629 (2000), codified at 4 U.S.C. §§ 119(a)(2)(C) and 120(b)(1).

Historically, the COMPACT evolved out of concern of the States and multistate taxpayers about proposed federal legislation to regulate state tax systems that followed the findings and recommendations of the Willis Committee.[5] *See* D. Brunori, *Interview: Gene Corrigan, a 'Proud Parent' of the MTC*, 17 STATE TAX NOTES 1295 (November 15, 1999). The States' initial interest in forming the COMPACT was to safeguard state taxing power in the context of multistate commerce, an essential governmental power for States to fulfill their constitutional role. To this end, the Commission reviews state decisions that preempt or restrict state tax sovereignty to determine whether a given decision can have a perverse influence over the development of the law in the remaining States.

A second and equally important function served by the Commission is its efforts to lead its member and other participating States in adopting methods to "promote uniformity or compatibility in significant components of tax systems." (COMPACT, Art. I, § 2.) To serve this important function without any coercive influences being asserted by the federal government, the Commission States must operate on a cooperative basis.

This cooperation is evidenced through several examples. For one, the Commission holds quarterly meetings of the respective Directors of Revenue and their top staff to discuss methods of cooperation

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[5]The Willis Committee, a congressional study of State taxation of interstate commerce sanctioned by TITLE II of PUB. L. 86-272, 73 STAT. 555, 556 (1959), made extensive recommendations as to how Congress could regulate State taxation of interstate and foreign commerce.

and joint action for achieving increased uniformity and decreased complexity in the states' tax laws and their administration.

The Commission studies and adopts uniform regulations as recommendations to all States in various areas of transactional and operational taxation of multistate enterprises and transactions.

The Commission also issues statements of advice to multistate businesses on various aspects of state taxation. An example of this activity is that, both before and after this Court's decision in *Wisconsin Department of Revenue v. Wrigley Co.*, 505 U.S. 214 (1992), the Commission States executed a Statement providing the taxpaying community with a collective interpretation of Pub.L. 86-272 that they could rely on in making their tax filing decisions.[6]

Another Commission effort to bring added harmony and uniformity to the states' varied efforts to enforce their tax laws is its Alternative Dispute Resolution Program. This Program offers a single forum for two or more States, or for taxpayers with a tax issue that stretches between two or more States, to explore state tax conflicts through the voluntary processes of mediation and arbitration.

A last example of cooperative efficiencies among the States is the Commission's Joint Audit Program. Commission States streamline the audit process

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[6] See, "Statement of Information Concerning Practices of the Multistate Tax Commission and Signatory States Under Public Law 86-272" originally adopted by the Commission on July 11, 1986, revised January 22, 1983, July 29, 1994, July 27, 2001, *at* http://www.mtc.gov/uniform/pl86272-_72701.pdf.

through this Program, so that multistate businesses may be subjected to only one audit on behalf of several States, thus providing increased uniformity and reduced compliance cost.

A vital mission of the Commission, as made clear from the above examples, is its safeguarding of the relationships that propel those activities—the willingness of States to put their oars in the water and to voluntarily pull in concert with one another in the direction of creating more uniform and less burdensome state tax systems. The scuttling of this "cooperative federalism"[7] is raised by the Nevada Supreme Court's decision below.

ARGUMENT

IT IS IMPORTANT AND TIMELY FOR THE COURT TO RE-EXAMINE ITS DECISION IN *NEVADA v. HALL*, 440 U.S. 410 (1979) TO SETTLE WHETHER IT APPLIES TO THE CORE SOVEREIGNTY AREA OF STATE TAXATION.

The Commission views the decision below to be an unwise extension of the Court's ruling in *Nevada v. Hall*. That case involved a traffic accident in California involving a Nevada state employee. The majority held that neither Article III to the U.S. Constitution, nor the principle of sovereign immunity, nor the Eleventh Amendment barred the negligence suit from being pursued in a California state court against the State of Nevada. In a telling footnote to the majority opinion, the Court noted an important limitation to its holding.

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[7] *Nevada v. Hall*, 440 U.S. at 422, fn. 24.

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result.

Id. The Nevada Supreme Court decision below raises that "substantial threat" to our system of cooperative federalism. Whatever different state policies this Court may have had in mind requiring a different analysis and different result, one cannot envision any state power more critical to its "capacity to fulfill its own sovereign responsibilities" than the power to impose tax.

The dissenting Justices in *Nevada v. Hall* were Chief Justice Burger, Justice Blackmun and then-Justice Rehnquist. A portion of Justice Rehnquist's dissent was most prophetic and lays the basis for the Court's granting review of this matter. Justice Rehnquist noted that:

> I join my Brother BLACKMUN'S doubts about footnote 24 of the majority opinion. Where will the Court find its principles of "cooperative federalism"? Despite the historical justification of federal courts as neutral forums, despite an understanding shared by the Framers and, for close to 200 years, expounded by some of the most respected Members of this Court, and despite the fact that it is the op-

erative postulate that makes sense of the Eleventh Amendment, the Court concludes that the rule that an unconsenting State is not subject to the jurisdiction of the courts of a different State finds no support "explicit or implicit" in the Constitution ... .. If this clear guidance is not enough, I do not see how the Court's suggestion that limits on state-court jurisdiction may be found in principles of "cooperative federalism" can be taken seriously. Yet given the ingenuity of our profession, pressure for such limits will inevitably increase. Having shunned the obvious, the Court is truly adrift on uncharted waters; the ultimate balance struck in the name of "cooperative federalism" can be only a series of unsatisfactory bailing operations in fact.[8]

This case provides an important opportunity for the Court to re-examine and clarify its Eleventh Amendment, sovereign immunity and comity jurisprudence as it may be applied to state tax administration. The Commission suggests that either of two courses is navigable here. The Court can go from buoy to buoy—keeping the ship afloat by, in Chief Justice Rehnquist's words, "bailing" when the circumstances identify that a *core sovereignty* value is at stake. Or, the Court can chart that more direct course that the dissenters in *Nevada v. Hall* suggested was the proper legal result—that the sovereign State be subject to a sister state's judicial process only to the extent of its waiver of immunity. Under either course, it is critical that the administration of state taxes be safeguarded in a watertight

[8] *Id.* at 442-443.

hold of the ship of state in order that each State retain its "capacity to fulfill its own sovereign responsibilities." States must therefore be afforded immunity from interference to the extent not expressly waived.

The fact that a state's ability to raise revenue through taxation embodies a core sovereignty value is beyond any real dispute. This Court has consistently recognized that the states' taxing powers provide a necessary element supporting our federal system. *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 515 U.S. 582, 587 (1995), quoting *Dows* v. *City of Chicago*, 11 Wall. 108, 110 (1871) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible."); *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444 (1940). Without that power, the States will either have to forgo providing its residents needed services and protections or be relegated to a total dependency upon the federal government. Whether construing the Constitution or a congressional statute, the Court has cautioned against quick and superficial findings that the state taxing power is barred. *Department of Revenue* v. *ACF Industries, Inc.*, 510 U.S. 332, 345 (1994)

The administrative and judicial bodies of the State of California have always been open to Mr. Hyatt for his obtaining review of the actions taken by the Franchise Tax Board personnel. Who can anticipate what the outcome of a properly conducted protest of his tax assessments might be if his Cali-

fornia administrative remedies were pursued and exhausted? The rulings of the Nevada Supreme Court below with regard to the protective order and the privilege rulings are calculated to impede the pending California administrative process.

The exhaustion of administrative remedies requirement is an extremely important policy in all state jurisdictions. Its application to the state tax area is necessary to protect the state's core interest in revenue raising. With rare exception, States require those seeking to challenge their tax obligations to administratively dispute them, after assessment or payment, before resorting to judicial remedies. The satisfaction of this requirement—the exhaustion of the administrative review process—is a reasonable condition before a State waives its sovereign immunity in the tax area. As noted by the Nevada Supreme Court in an unrelated case:

> The 'exhaustion doctrine' is sound judicial policy. If administrative remedies are pursued to their fullest, judicial intervention may become unnecessary. Had appellant sought relief before the respective boards of equalization, he may well have been granted the relief he now seeks in the first instance by judicial intervention.[9]

It is critical for the Court to review this matter and set the appropriate course to be followed in matters vital to state tax administration. If the decision below is allowed to stand, it dredges a channel for those wishing to hijack the administration of

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[9] *First American Title Company v. State of Nevada, et al.*, 91 Nev 804, 543 P.2d 1344 (1975).

state tax systems. They can do so merely by launching a paper boat carrying allegations of an intentional tort, pled "on information and belief," without more, indeed, without mooring.

For example, a state's attempt to obtain records from an out-of-state taxpayer for the most basic income tax audit may, on occasion, meet with resistance. Most, if not all, States provide their revenue departments with specific statutory authority to employ administrative subpoena power with enforcement, if necessary, through the issuing state's trial court. See, for example, Cal. Rev. & Tax. Code § 19504 and Nevada Rev. Stat. §§360.240.3, 375A.815 and 375.820. The taxpayer would normally defend against subpoena enforcement in that state's court on any one of a number of grounds, such as relevancy, undue burden of the request, or privilege. Could the taxyaper, under *Nevada v. Hall*, stop the audit (and any potential assessment) in its tracks by filing an action in a court of the State of its domicile merely alleging, without more, that the auditing State was violating its Fourth Amendment protection against unreasonable search and seizure? If so, the ability of States to administer their tax systems and to conduct audits of out-of-state taxpayers in a timely fashion will have been effectively torpedoed.

CONCLUSION

Recent revelations about shifting income to tax havens by several U.S. corporations highlight substantial tax avoidance and tax evasion that subverts fair, rational and credible federal and state tax systems. A more vigilant and effective enforcement of our tax laws on both state and national levels is

necessary to have all players in our economic system contribute their fair share to our self-governance. Timely and thorough auditing of businesses and individuals that earn income from sources within a State, but locate themselves outside the State, is one very important way to separate the tax smart from the tax cheats. The decision below may make that auditing all but impossible.

Based on the foregoing, the Commission respectfully requests that the Court grant California's petition, so that the Court can examine the full ramifications of *Nevada v. Hall.*

Respectfully submitted,

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(4)

No. 02-42

In the Supreme Court of the United States

OCTOBER TERM, 2001

Franchise Tax Board of the State of California,

Petitioner,

v.

Gilbert P. Hyatt and Eighth Judicial District Court of the State of Nevada,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Nevada

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Brief of the States of Oregon, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming, Commonwealths of N. Mariana Islands and Puerto Rico, Amici Curiae in Support of Petitioner

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QUESTION PRESENTED

Did the Nevada Supreme Court impermissibly interfere with California's capacity to fulfill its sovereign responsibilities, in derogation of Article IV, section 1, by refusing to give full faith and credit to California Government Code section 860.2, in a suit brought against California for the torts of invasion of privacy, outrage, abuse of process, and fraud alleged to have occurred in the course of California's administrative efforts to determine a former resident's liability for California personal income tax?

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INTEREST OF *AMICI*

If followed by other states, the Nevada Supreme Court's decision in this case will infringe on the capacity of States to perform a core governmental function – that of assessing and collecting taxes. Because that infringement involves the very danger this Court warned about in *Nevada v. Hall*, 440 U.S. 410, 424 n. 24 (1979), *amici* urge this Court to grant California's petition for *certiorari*.

Like petitioner California, many *amici* States tax the income of their residents as well as the income of non-residents derived from in-state sources. This tax represents a major portion of the operating funds these States need to perform their essential governmental functions. As part of their tax collection and assessment efforts, these States, like California, conduct audits of former residents now living in other States, or of individuals or corporations residing out-of-state that derive income from doing business in their State, to determine the existence and extent of any tax obligation owed.[1]

Many *amici* States cannot be sued in their own state courts for their conduct or activities in connection with residency audits or other tax collection matters.[2] Oregon, for example,

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[1] Oregon, for example, annually conducts 120 to 150 audits of corporations doing business in Oregon but headquartered outside the State. The issues auditors review typically require out-of-state examination of corporate minutes and financial records. On the personal income tax side, Oregon audits nonresidents to determine the legitimacy of their non-residency status as well as claims of entitlement to special federal exemptions from state income taxes based on, *inter alia*, their employment with the airlines, barge companies or the federal government.

[2] Amici States with specific statutes retaining immunity as to claims involving the assessment and collection of taxes include: Hawaii (HAW. REV. STAT. ANN. § 662-15(2) (Michie 2002)); Idaho (IDAHO CODE § 6-904A(1) (Michie 1998)); Massachusetts (MASS. GEN. LAWS ANN. ch. 258, § 10(d) (West 1988 & Supp. 2002)); Minnesota (MINN. STAT. ANN. § 3.736, subd. (3)(C) (1998 & Supp. 2002), *but see, e.g.*, MINN. STAT. sec-

has retained its sovereign immunity from suits involving the collection and assessment of taxes. Under Article IV, section 24 of the Oregon Constitution, the State is immune from suit except as it consents to suit by general law. *Hale v. Port of Portland*, 308 Or. 508, 514-18, 783 P.2d 506 (1989). While Oregon has chosen to waive its sovereign immunity from suit for torts committed by its agencies and employees generally, it retained that immunity for claims involving certain types of conduct or activities. *See* OR. REV. STAT. § 30.265(3)(2001). Prominent among those claims for which it retained immunity is "any claim in connection with the assessment and collection of taxes." OR. REV. STAT. § 30.265(3)(b)(2001). *See Anderson v. Dept. of Rev.*, 313 Or. 1, 7, 828 P.2d 1001 (1992).[3]

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tions 270.275-.276 (1998 & Supp. 2002) (limitations on immunity)); Mississippi (MISS. CODE ANN. § 11-46-9(1)(I) (2002)); Nebraska (NEB. REV. STAT. § 81-8, 219(2) (1996)); Oklahoma (OKLA. STAT. ANN. tit. 51, § 155(11) (West 2000 & Supp. 2002)); South Dakota (S.D. CONST. art. III, § 27; S.D. CODIFIED LAWS §§ 21-32-16 to-18 (Michie 1987) §§ 3-22-10, -17) (Michie 1994)); Utah (UTAH CODE ANN. §§ 63-30-10(8), 59-1-704 (1997 & Supp. 2002)); Vermont (VT. STAT. ANN. tit. 12, § 5601(e)(2) (1973 & Supp. 2001)).

Amici States with general sovereign immunity statutes that may apply to claims involving the assessment and collection of taxes include: Alaska (ALASKA STAT. § 09-50-250 (Lexis 2000); Arkansas (ARK. CODE ANN. tit. 10, §§ 4011, 4012 (1999)); Illinois (745 ILL. COMP. STAT. 5/1) (1993); Indiana (IND. CODE §§ 34-13-2-1, -3-1, -4-1 (1999 & Supp. 2002)); Louisiana (LA. REV. STAT. ANN. § 42.1441.A (WEST 1990)); Maine (ME. REV. STAT. ANN. tit. 14, § 8103.1 (WEST 1980)); Wisconsin (WIS. STAT. ANN. § 893.80 (WEST 1997 & Supp. 2001)).

[3] In *Anderson*, the court observed that Oregon had enacted refund statutes by which disgruntled taxpayers could challenge what they believed to be the collection of improper taxes and that, in doing so, Oregon had waived its immunity in a limited sense. Thus, taxpayers who believe taxes have been collected from them in an invalid manner do have some recourse against the State.

If other States follow the Nevada Supreme Court's lead, Oregon and *amici* States that have retained tax-collection immunity will be subject to the jurisdiction of and liability in the courts of another State for performing a core governmental function. That is, their policy decision to retain their sovereign immunity means sovereign immunity only in their own courts and in federal courts, except to the extent they have consented to suit. The value of that immunity will be significantly impaired if they can be sued in Nevada or the courts of another State that — like Nevada — has decided to limit or abandon sovereign immunity for claims involving its own conduct.[4]

The mere possibility that States conducting residency-tax audits or other investigations of potential tax liability of nonresidents could be subject to this type of litigation in a foreign State literally sends chills down the spines of state tax administrators. All States face shrinking monetary resources. They must be vigilant in collecting every legitimate dollar of tax revenue. Taxpayers with the most to lose—like respondent Hyatt in the present case—have every incentive to follow respondent's lead, citing the Nevada court's decision, in an effort to forestall, if not thwart entirely, states' legitimate tax-collection efforts. States cannot afford to lose the revenue such investigations and tax audits produce; yet many cannot afford to become embroiled even in one drawn-out, expensive, audit-related lawsuit of the kind California faces in this case.[5]

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[4] Such concerns are not far fetched. Oregon currently is auditing a taxpayer claiming to have changed residency to Nevada prior to an $8 million dollar sale of stock. Fortunately, for now at least, the taxpayer is cooperating with the audit.

[5] California reportedly has incurred to date over $2.5 million in legal costs, including out-of-state attorney fees, defending this lawsuit. The *entire* legal services budget for the Oregon Department of Revenue for the

Only this Court can clarify whether a state's retention of sovereign immunity as to conduct involving core governmental functions is entitled to respect in the courts of another State. Without this Court's resolution of that question, States throughout the country likely will be called to answer and defend in foreign courts claims that they have misused or abused their authority in attempting to collect taxes due their States. This is costly, wasteful litigation that can be avoided only by this Court resolving the question now. *Amici* States thus urge the court to grant *certiorari* and clarify that a state's retained immunity from suit as to core governmental functions is entitled to respect in the courts of a sister State, regardless of the immunity-retention position taken by that sister State as to its own, similar conduct.

JURISDICTION

Although the Nevada Supreme Court's decision in this case contemplates that further proceedings will occur in the state's trial court, this Court's authorities make clear that the decision is nevertheless one over which this Court has jurisdiction. The state court's decision is a "final judgment" within the meaning of 28 U.S.C. § 1257(a) for at least two reasons.

First, the decision finally disposes of an original proceeding brought by California in the Nevada Supreme Court. *See, Fisher v. District Court*, 424 U.S. 832, 385 n. 7 (1976) (holding that a writ of supervisory control issued by the Montana Supreme Court is a final judgment for purposes of 28 U.S.C. § 1257 (3)); *Madruga v. Superior Court of California*, 346 U.S. 556, 557 n. 1 (1954) (holding that the California Supreme Court's judgment "finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257."); *Bandini Co. v. Superior Court*, 284 U.S. 8,

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2001–03 biennium is $2.9 million, and most of that budget is required to provide legal support for its property tax program.

14-15 (1931) (same). *See also Pacific Coast Dairy v. Department of Agriculture*, 318 U.S. 285 (1943) (accepting jurisdiction, without discussion, of California Supreme Court decision denying petition for writ of mandamus).

Second, the Nevada Supreme Court's decision fits the fourth of four categories of state-court decisions this Court identified in *Cox Broadcasting Corp v. Cohn,* 420 U.S. 469 (1975), as satisfying the finality requirement even though further proceedings were to take place in the state court. The fourth category is satisfied here because the court's decision fully decided the federal issue (*i.e.*, whether the Full Faith and Credit Clause barred Nevada courts from asserting jurisdiction over California under the circumstances presented), reversal of the Nevada judgment would preclude further litigation in the state's lower courts, and this Court's refusal to review the issue might seriously erode federal policy underlying the Full Faith and Credit Clause. *See Florida v. Thomas*, 532 U.S. 774 (2001) (explaining and applying the four categories of cases identified in *Cox Broadcasting*); *Flynt v. Ohio*, 451 U.S. 619, 620-622 (1981) (rejecting Flynt's argument that the Ohio Supreme Court's reversal on appeal of a trial court judgment dismissing state criminal complaints against him satisfied the fourth category, based on the Court's determination that there was "no federal policy that will suffer if the state criminal proceeding goes forward.") As discussed *infra*, subjecting California to the jurisdiction of and a trial in the State of Nevada, thereby causing California effectively to lose the benefit of its retention of immunity, will erode federal policies underlying the recognition of immunity.

ARGUMENT

1. In *Nevada v. Hall*, this court allowed California courts to assume jurisdiction over the State of Nevada in a tort claim arising from a State of Nevada employee's traffic accident with a California resident in California. In doing so this Court

rejected Nevada's argument that allowing California to assume jurisdiction over Nevada violated the Full Faith and Credit Clause. This Court further rejected Nevada's plea, also based on the Full Faith and Credit Clause, that California apply Nevada's $25,000 tort-claim limits rather than California's unlimited recovery statute. This Court concluded that California's assumption of jurisdiction and rejection of Nevada's tort-claim limits was permissible because doing otherwise would be "obnoxious to its statutorily based policies of jurisdiction over nonresident motorists and full recovery," and, hence, not required by the Full Faith and Credit Clause. 440 U.S. at 424.

This Court, however, went out of its way to note that by exercising jurisdiction in that case, California was not posing a "substantial threat to our constitutional system of cooperative federalism." 440 U.S. at 424, n. 24. *Hall*, after all, involved only a traffic accident, and allowing such a case to proceed in California "could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities." *Ibid.* The Court added that it had "no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result." *Ibid.* This Court thus implied that, were the lawsuit of a kind that would or might interfere with Nevada's capacity to fulfill its own sovereign responsibilities, a different result might obtain. At a minimum, however, this Court was clear that its decision did not signal how it would rule in a case where a foreign court's assumption of jurisdiction *would* interfere with another state's ability to carry out its core governmental duties.

The present case is that case.

In reaching its decision, however, the Nevada Supreme Court ignored *Hall's* cautionary footnote. The state court analyzed the Full Faith and Credit Clause issue as if California merely had been involved in an automobile accident in Nevada. That the acts of which plaintiff was complaining arose out of California's exercise of core governmental functions, and that the maintenance of this lawsuit in Nevada posed a severe drain on California's resources, thereby seriously impeding its ability to carry out those core functions, were of no consequence in the court's analysis. *Amici* submit that these factors not only are relevant in the proper analysis but, when properly considered, militate in favor of a result contrary to that reached by the Nevada Supreme Court. This case gives the Court the opportunity to explain the proper analysis to be employed when a State asserts that a foreign state's assumption of jurisdiction, or failure to respect the state's retained sovereign immunity, would adversely impact the state's ability to carry out its core governmental responsibilities.

2. State and other lower courts need guidance in the application of *Hall* and the Full Faith and Credit Clause in cases where those courts are asked to assume jurisdiction over other States in connection with their exercise of core governmental duties. Some state courts have construed the "cooperative federalism" language in *Hall* as an absolute jurisdictional bar to suits implicating another state's core governmental functions. For example, in *Guarini v. State of New York*, 521 A.2d 1362 , 1368 (N.J.Super.Ch.), *aff'd* 521 A.2d 1294 (N.J. Super.A.D. 1986), *cert. den.* 484 U.S. 817 (1987) (cited in California's petition for *certiorari*, p. 12), a New Jersey court declined to assert jurisdiction over a suit filed by New Jersey residents and politicians challenging New York's authority over the Statute of Liberty and various Hudson River islands. 521 A.2d at 1368. Although located closer to New Jersey's side of the river, those islands had been under New York's authority for more than 150 years pursuant to an 1834 Con-

gressionally approved compact between the two states. 521 A.2d at 1364. The *Guarini* court reasoned:

> Residents of New Jersey are attempting here to challenge the governmental authority of New York over territory which by interstate compact is under New York's jurisdiction. Permitting this suit would violate principles of cooperative federalism and interfere with New York's exercise of sovereign responsibilities pursuant to that interstate compact.

(citing *Hall*, 440 U.S. at 424, n. 24). *See also Struebin v. State of Illinois*, 421 N.W. 2d 874 (Iowa Supr.), *cert. den.* 488 U.S. 851 (1982) (*Struebin II*) (citing suit in *Guarini* as type of threat to cooperative federalism about which *Hall* warned); *State of Montana v. Gilham*, 133 F.3d 1133, 1138 (9th Cir. 1998) (assuming *Hall* extended to suits brought in tribal court, it did not apply to suit that "directly implicates the exercise of Montana's sovereign functions. Gilham would hold Montana liable for its governmental decisions concerning highway design. This is far different from *respondeat superior* tort liability, which would normally only have financial effect. Because the suit's theory would affect governmental processes, it falls outside the scope of *Nevada v. Hall*.").

At the other end of the spectrum are courts treating *Hall's* cautionary footnote as having no meaning at all. Such was the case in *Biscoe v. Arlington County*, 738 F.2d 1352 (D.C. Cir. 1984), *cert. den.* 469 U.S. 1159 (1985), which involved a high-speed police pursuit from Virginia to the District of Columbia, a subsequent auto accident, and a negligence action filed in a D.C. court by injured D.C. residents against the Virginia county. Based on footnote 24 in *Hall*, the Virginia county asserted immunity on the grounds that the plaintiffs' action "undermines [the county's] capacity to fulfill its law enforcement responsibilities." 738 F.2d at 1358. The D.C.

Circuit rejected that argument. First, it reasoned that the cited footnote in *Hall*

> does not in any respect limit the holding to the facts of that case. Nor does the footnote suggest that an exception must ever be made to the principles articulated in the opinion.

738 F.2d at 1358. Second, and in any event, the court indicated that the footnote would not have any impact here because the conduct of which plaintiff complained occurred outside Virginia's borders.

> * * * Arlington County itself expressly recognizes that its law enforcement interests weaken—and will yield to other interests—when it acts outside Virginia's borders. * * * The result is that the threat to the County's sovereignty is considerably less, and the threat to another entity's sovereignty is considerably greater than * * * where a state has acted only within its own borders. In sum, application of Virginia's policy would clearly frustrate District policies in favor of deterrence and compensation, and the facts of this case warrant no further inquiry into the meaning of the quoted footnote.

738 F.2d at 1358.

3. Providing state and other lower courts with guidance on these issues is timely, particularly in light of the profound concern that this Court has articulated since *Nevada v. Hall* for the sovereignty of states *vis a vis* the federal government. *See Alden v. Maine*, 527 U.S. 706 (1999) (Congress by authorizing private actions against non-consenting States in state court under the Fair Labor Standards Act unconstitutionally abrogated state sovereign immunity); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (same regarding actions in federal court un-

der the Federal Trademark Remedy Clarification Act); *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62 (2000) (same regarding the federal Age Discrimination in Employment Act); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) (acknowledging the inapplicability of the *Ex Parte Young* doctrine in actions implicating special sovereign interests). *See also Federal Maritime Comm'n v. South Carolina Ports Authority*, 535 U.S. ___, 122 S. Ct. 1864, 1874 (2002) (state sovereign immunity "bars the FMC from adjudicating complaints filed by a private party against a nonconsenting State.") Against the backdrop of these cases, it is appropriate for this Court to revisit *Nev da v. Hall*, not necessarily for the purpose of overruling t.at decision, but for examining whether in light of the renewed emphasis on state sovereignty the Full Faith and Credit Clause, under some circumstances at least, mandates that a foreign State give full credit to a sister state's retention of its sovereign immunity.

Not only is it in the interests of other States to have this Court examine the issue presented in this case now, it is in California's interests as well. One perhaps overarching reason for a state's retention of immunity for conduct involving core governmental functions is to prevent state officials engaged in that conduct from altering their behavior out of fear of becoming embroiled in litigation that takes them away from their governmental duties. If a decision denying immunity cannot be reviewed pre-trial, the immunity is "effectively lost." *See, e.g., Mitchell v.* Forsyth, 472 U.S. 511, 526-27 (1985) ("The reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable" – *i.e.*, the "entitlement is immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.") *Cf Federal Maritime Comm'n v. South Carolina Ports Authority*, 122 S. Ct. 1877 (sovereign immunity "provides an immunity from suit" and "does not merely constitute a defense to monetary liability or even to all types of liability."); *Puerto Rico Aqueduct and Sewer Authority v. Metcalf Eddy, Inc.*, 506 U.S 139, 146 (1993) ("The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)).

The Nevada Supreme Court's refusal to give due respect to California's retained immunity has caused California to expend significant financial resources and to divert officials and employees from their primary governmental duties in order to defend against respondent Hyatt's claims. That expense and consequent reduction in service to the citizens of California will only continue to mount if California is required to defend against these claims on the merits. Only by agreeing to resolve the issue presented now can this Court give California some practical relief.

4. For cooperative federalism to flourish, it is critical that States give due respect to other states' decisions to retain immunity from suit regarding core governmental activities. *Amici* believe that the majority in *Nevada v. Hall* included footnote 24 to recognize the fundamental importance to cooperative federalism of States not infringing on the "capacity" of other States to fulfill their own "sovereign responsibilities," and to respond to concerns that failing to give due respect in such cases would increase the opportunity and likelihood of retaliation. *See Nevada v. Hall*, 440 U.S. at 429 (Blackmun, J., dissenting) ("States in all likelihood will retaliate against one another for respectively abolishing the 'sovereign immunity' doctrine."); *id.* at 443 (Rehnquist, J., dissenting) (States will "try to isolate assets from foreign judgments and generally reduce their contacts with other jurisdictions."). The failure of States to recognize other states' retention of immunity as to conduct involving core governmental functions will

likely cause affected States to be less cooperative in their dealings with, and perhaps less trustful of, those States. These consequences are the antithesis of cooperative federalism.

Unless this Court intervenes now, certainly some—perhaps many—taxpayers will follow respondent Hyatt's path and seek to block states' legitimate tax collection efforts, hoping that by dragging States through the judicial processes of foreign courts States will forego those efforts. The Nevada Supreme Court's decision provides a roadmap for disgruntled taxpayers and other state courts to follow. While other courts faced with having to process these cases may ultimately disagree with the Nevada Supreme Court's decision, still the process itself, as is evident in this case, will be time-consuming, expensive and detrimental to states' ability to perform this core governmental responsibility.

CONCLUSION

The question raised in this case is squarely presented and, so far as *amici* States are aware, free of procedural irregularities. *Amici* implore the Court to grant *certiorari* and reverse the decision of the Nevada Supreme Court.

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IN THE SUPREME COURT OF THE UNITED STATES

FRANCHISE TAX BOARD
OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT AND THE EIGHTH JUDICIAL
DISTRICT COURT OF THE STATE OF NEVADA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF OF THE STATES OF FLORIDA, ALASKA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, INDIANA, MAINE, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, NORTH DAKOTA, OHIO, UTAH, VERMONT, VIRGINIA, WEST VIRGINIA, and the COMMONWEALTH OF PUERTO RICO AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI*

Whether private citizens may sue nonconsenting States is an issue of manifest importance to the States. The amici believe that the Constitution preserves the sovereign immunity of each State from suit against its will in the forum of a sister State. Because the issue in this case goes to jurisdiction of the courts of Nevada to subject the State of California to its legal processes, this Court has a duty to examine the jurisdictional question *sua sponte*, even if the parties in this case should fail to raise it. *See, e.g., Regents of the University of California v. Bakke,* 438 U.S. 265, 280 n.14 (1978) (noting Court's obligation to address jurisdictional questions raised only by the *amici*).

ARGUMENT

THE DECISION IN *NEVADA v. HALL* SHOULD BE OVERRULED

In 1979, this Court decided *Nevada v. Hall*, 440 U.S. 410 (1979), holding that the State of Nevada was amenable to suit in the courts of California without regard to a general claim of sovereign immunity. The *Hall* case arose out of a highway accident between residents of California and an employee of the State of Nevada, driving a vehicle owned by the State, while on State of Nevada business in California.

The case at bar involves the same two States, albeit with roles reversed. Hyatt, the plaintiff below, sued the State of California (through its Franchise Tax Board) and its individual agents. This case arose out of the efforts of California to collect taxes it claimed were due from Hyatt and the alleged tortious conduct of both the Tax Board itself and its agents. Suit was brought in Nevada state court because at least some of the allegedly tortious conduct occurred there. Based on the holding in *Hall*, the Nevada Supreme Court held that California was not immune from suit in Nevada courts and that Nevada was not required to give full faith and credit to the limits in California's

waiver of sovereign immunity statute.

Although the question presented to this Court is whether the Nevada Supreme Court correctly applied *Nevada v. Hall* and the Full Faith and Credit Clause, a necessary predicate issue is whether *Nevada v. Hall* was correctly decided. Over the past seven years, this Court has held that the Constitution preserves and protects the States' sovereign immunity from private suits in federal courts, in their own courts, and in federal administrative tribunals, even when Congress has attempted to abrogate that immunity under its Article I powers. *See Seminole Tribe v. Florida,* 517 U.S. 44 (1996); *Alden v. Maine*, 527 U.S. 706 (1999); *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743, 122 S. Ct. 1864 (2002) ("*FMC*"). In light of the reasoning underlying those decisions, it is necessary to reconsider whether the Constitution also protects the States' sovereign immunity from private suits brought in the courts of other States.

The answer, we submit, is that it does. The founding generation understood that a sovereign could not be sued without its consent and there is nothing in the ratification of the Constitution that can be construed as a surrender of this immunity with respect to suit in the courts of sister States. Any time a sovereign State is haled before the courts of another sovereign, either state or federal, without its consent, that State's sovereignty is impermissibly violated. *Nevada v. Hall* should now be overruled.

I.
THE ANALYSIS APPLIED IN *NEVADA V. HALL* DID NOT RECOGNIZE THAT THE IMMUNITY OF THE STATES DERIVES FROM THE STRUCTURE OF THE CONSTITUTION

1. In *Hall*, the Court held that a State is not constitutionally immune from suit in the courts of another State. The Court observed that the doctrine of sovereign immunity was an "amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign." *Id.* at 414. While the first type of immunity "has been enjoyed as a matter of absolute right for centuries," *id.* at 414, this did not provide support "for a claim of immunity in another sovereign's courts." *Id.* at 415. The second type of immunity, the Court held, was based on comity. *Id.* at 416-18. Thus, although the Court recognized that such law of nations immunity surely would have been sustained had the case been brought in 1812, the power to recognize the immunity rested with the sovereign state, which could change its position on this question, as California had done. *Id.* at 417-18.

The Court in *Hall* dismissed the Framers' debate regarding sovereign immunity as irrelevant, for that debate "focused on the scope of the judicial power of the United States authorized by Article III." *Id.* at 419. Likewise, concluded the Court, the negative reception to *Chisholm v. Georgia*, 2 Dall. 419 (1793), and prompt adoption of the Eleventh Amendment have no bearing on a State's amenability to suit in a non-federal court. *Id.* at 420. The Court therefore turned to whether, as a matter of full faith and credit doctrine, California courts were required to respect Nevada's limitations on its own suability. *Id.* at 421-24. The Court concluded they were not.

2. The trilogy of *Seminole Tribe*, *Alden*, and *FMC* approached the issue of sovereign immunity in a very different manner. Based on their review of the pertinent history and understanding of the Framers, these decisions recognized that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself." *Alden*,

527 U.S. at 728. It did not matter, therefore, that the debates surrounding the adoption of the Constitution focused on States' immunity in Article III courts and that the Eleventh Amendment speaks only to the jurisdiction of such courts. "The Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." *Id.* at 728-29. *See also*, *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934) ("Behind the words of the constitutional provisions are postulates which limit and control. . . . There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.' ")

A proper analysis of whether States may be sued without their consent in the courts of other States must begin, therefore, with the "'presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution – anomalous and unheard of when the constitution was adopted.'" *Alden*, 527 U.S. at 727 (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)). This requires the Court to look to "'history and experience, and the established order of things,' . . . in determining the scope of the States' constitutional immunity from suit." 527 U.S. at 727 (quoting *Hans*, 134 U.S. at 13, 14). The Court invoked this "presumption" in *FMC*, 535 U.S. at ___ , 122 S. Ct. at 1872, where it "attribute[d] great significance to the fact that States were not subject to private suits in administrative adjudications at the time of the founding or for many years thereafter."

When this presumption is put to use it leads to a two-part analysis to determine whether States are immune from a particular suit:

(1) Whether the founding generation would have understood that the States were immune from such suits at the time of the framing and ratification of the Constitution or whether the particular proceeding against the State would have been

"anomalous and unheard of when the Constitution was adopted."; and

(2) Whether there is evidence showing an intent to surrender an existing immunity in the plan of the convention or in the explicit words of the Constitution.

Application of this inquiry reveals that the Constitution grants the States immunity from suits instituted by private parties in the courts of other States. By failing to recognize the presumption against subjecting States to "anomalous and unheard of" proceedings, and failing to undertake the concomitant two-part analysis, the *Hall* Court reached an erroneous conclusion.

II.
THE FOUNDING GENERATION WOULD HAVE UNDERSTOOD THAT STATES WERE IMMUNE FROM PRIVATE ACTIONS BROUGHT AGAINST THEM IN THE COURTS OF OTHER STATES

Just as the Framers understood that States were immune from private suits in federal court and in their own courts, so too did the Framers understand that States were immune from private suits brought in the courts of other States. This is evidenced by statements and actions of the Framers concerning sovereign immunity generally, and statements and actions of the Framers concerning the law of nations.

1. In *Alden*, the Court held that immunity from suit in a State's own courts is a fundamental aspect of sovereignty, retained by the States except as altered by the Constitution, and that Congress' Article I powers do not authorize it to abrogate that immunity. In reaching this conclusion, the Court looked to the Framers' understanding that "it was well established in English law that the Crown could not be sued without consent in its own courts." *Id.* at 715. That understanding was reflected in Justice Iredell's dissent in *Chisholm v. Georgia*, 2 Dall. 419, 437-46 (1793), in Blackstone, and in *The Federalist No. 81*, written by Alexander Hamilton. *Id.* at 715-17. Of particular relevance here, that understanding was expressed in terms that encompassed suits brought in the courts of other States.

For example, the Court, both in *Alden* and later in *FMC*, quoted Hamilton as follows:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States.

Alden, 527 U.S. at 716-17 (quoting *The Federalist No. 81*) (emphasis in original); *FMC*, 535 U.S. at ___ , 122 S. Ct. at 1871 (same quotation). The Court in *Alden* went on to identify statements at the Virginia Convention that "echoed this theme," such as James Madison's statement that "[i]t is not in the power of individuals to call any state into court," and John Marshall's statement that "[i]t is not rational to suppose that the sovereign power should be dragged before a court." 3 ELLIOT'S DEBATES 533, 555-56, *quoted in Alden*, 527 U.S. at 717-18.

Not only do the ratification debates and the events leading to the adoption of the Eleventh Amendment reveal the original understanding of the States' constitutional immunity from suit, they also underscore the importance of sovereign immunity to the founding generation. Simply put, "The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Alden*, 527 U.S. at 727 (quoting *Atascadero State Hospital v. Scanlon*, 473 U. S. 234, 239 n.2 (1985)).

2. The Framers' conception of international law was one which provided absolute immunity to foreign sovereigns.[1] This

[1] This case turns on the doctrine of absolute sovereign immunity understood at the time of the convention. *Amici*, however, understand that under the modern or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis). 26 Dept. State Bull 984 (1952) (the "Tate letter"). The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C.A. § 1602 *et seq*., codifies this modern restrictive theory of sovereign immunity.

understanding can be gleaned from Chief Justice Marshall's decision in *The Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812). The case involved the protection of an armed vessel in the services of a friendly sovereign. In the absence of a foreign sovereign's consent, the Court held that American courts cannot adjudicate any controversy to which a foreign sovereign is a necessary party. The Court further held that no power resided in Congress or in the courts to require a foreign sovereign to become a party defendant in any action. Although *The Schooner Exchange* involved a ship of war, this Court later rejected an attempt to differentiate between commercial and war vessels of governments. *See Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562 (1926).

The case of *Nathan v. Virginia*, 1 Dall. 77 (1781), confirms that this was the understanding of the Framers. In that case, the Pennsylvania Court of Common Pleas held that Virginia's sovereign immunity rendered it immune from legal process issued by Pennsylvania. The Virginia delegates to the Confederation Congress, which included James Madison, objected to Nathan's suit against Virginia, arguing that "the property of the State of Virginia cannot be arrested or detained by process issuing from any of the Courts or Magistrates of Pennsylvania or any other State in the Union, and that for Virginia to submit to the jurisdiction of the Pennsylvania courts would be to abandon its Sovereignty by descending to answer before the Tribunal of another Power."[2] Pennsylvania Attorney

[2] Letter from Virginia delegates to Supreme Executive Council of Pennsylvania dated 7/9/1781, reprinted in 3 THE PAPERS

General Bradford responded: "We are all of Opinion that the Commonwealth of Virginia being an independent & Sovereign power, cannot be compelled to appear or answer in any Court of Justice within this State. That all process directed against the person of a Sovereign or against his Goods is absolutely void . . . and that all concerned in issuing or serving such process are guilty of a violation of the laws of nations. . . ."[3]

3. The Court in *Nevada v. Hall* acknowledged that absolute immunity of foreign sovereigns was the understanding at the time of the convention. Stated the Court, "[i]t is fair to infer that if the immunity defense Nevada asserts today had been raised in 1812 when *The Schooner Exchange* was decided, or earlier when the Constitution was being framed, the defense would have been sustained by the California courts." 440 U.S. at 417. The Court, however, ascribed this immunity to comity among nations and assumed that such immunity among nations at peace can be unilaterally revoked by the forum sovereign.

According to the majority in *Hall*, therefore, "[t]he opinion in *The Schooner Exchange* makes clear that if California and Nevada were independent and completely sovereign nations, Nevada's claim of immunity from suit in California's courts would be answered by reference to the law of California." 440 U.S. at 417 (footnote omitted). After concluding that California, like the United States, was free to determine whether to recognize law of nations immunity for sister States as a matter of comity, the majority found nothing in the Constitution that raised law of nations immunity to the level of a constitutional requirement. *Id.* at 418-26.

The Court erred in its reliance on *The Schooner Exchange* in two critical respects. First, there is no evidence that the Framers and ratifiers of the Constitution believed that law-of-nations immunity was merely a matter of comity, rather than a

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OF JAMES MADISON, 184 (William T. Hutchinson, *et al.*, eds., 1963).

[3] 3 PAPERS OF JAMES MADISON, *supra*, at 187 n.2.

fundamental tenet of international law based on mutual understanding and agreement that a sovereign was not free to disregard unilaterally. The leading international law treatise of the day, Vattel's LAW OF NATIONS, provided that law of nations immunity was an immutable principle of international law:

> *One sovereign cannot make himself the judge of the conduct of another.* The sovereign is he to whom the nation has intrusted the empire and the care of the government: she has invested him with her rights; she alone is directly interested in the manner in which the conductor she has chosen makes use of his power. It does not, then, belong to any foreign power to take cognisance of the administration of that sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it.[4]

Vattel's treatise, published in both French and English, was widely available to the Framers and ratifiers,[5] and it was cited both in the debates in the federal convention and in the state

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[4] Emmerich de Vattel, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 155 (1863 reprint) (Book II, Ch. 4, § 55) (emphasis added).

[5] *See* Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 Nw. U. L. Rev. 1027, 1061-66 (2002) (discussing widespread dissemination and use of Vattel's treatise in America). Benjamin Franklin wrote in 1775 to a Swiss sympathizer who had sent him several copies of Vattel's treatise: "I am much obliged by the kind present you have made us of your edition of Vattel. . . . [T]hat copy which I kept . . . has been continually in the hands of the members of our Congress now sitting." *Id.* at 1062 (footnote omitted).

ratifying conventions.[6]

Not even Edmund Randolph, "the foremost champion of state suability" in federal courts,[7] thought that a State could be sued in the courts of a sister State. To the contrary, in his 1790 Report to the House of Representatives, Randolph wrote:

> [A]s far as a particular state can be a party defendant, a sister state cannot be her judge. Were the states of America unconfederated, they would be as free from mutual controul as other disjoined nations. Nor does the federal compact narrow this exemption; but confirms it, by establishing a common arbiter in the federal judiciary, whose constitutional authority may administer redress.[8]

As a matter of historical interpretation, therefore, Justice Blackmun was certainly correct when he wrote in his dissent in *Nevada v. Hall* that "the Framers must have assumed that States

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[6] *E.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 436 (Max Farrand, ed., 1911) (Luther Martin, of Maryland, citing Vattel's LAW OF NATIONS during the federal convention); 4 J. Elliot, ed., THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 at 278 (1836) (Charles Pinckney, citing Vattel's LAW OF NATIONS during the South Carolina ratifying convention); 2 Elliot's DEBATES 453 (James Wilson, citing Vattel during the Pennsylvania ratifying convention); *see also* 29 Library of Congress, *Journals of the Continental Congress 1774-1789* 887 (1933) (reprinting 1785 letter from John Jay relying on *Vattel* for recognizing the United States' obligation to receive the Consul General of Great Britain).

[7] 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES at 600 (Maeva Marcus, ed., 1994).

[8] 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES at 130 (Maeva Marcus ed., 1992).

were immune from suit in the courts of their sister States. . . . The only reason why this immunity did not receive specific mention is that it was too obvious to deserve mention." *Id.* at 430-31. The only incorrect aspect of Justice Blackmun's statement was that this immunity *did* receive specific mention, as the excerpts above demonstrate.

Second, unlike the United States at the time of *The Schooner Exchange*, the several States consented at the time they ratified the Constitution to a limited waiver of their law-of-nations immunity. Article III, Section 2, specifically provided this Court with original jurisdiction in suits between States. As one ratifier explained, such jurisdiction was "necessary to secure impartiality in decisions, and preserve tranquility among the states. It is impossible that there should be impartiality when a party affected is to be judge."[9] It is inconceivable that the Framers and ratifiers expressly consented to a limited waiver of the States' law of nations immunity for original action suits between States in the neutral forum of the Supreme Court, while silently believing all along that a State could be haled into the courts of a sister State at the latter's whim. The Framers shared the background understanding that the law of nations barred one State from exercising jurisdiction over another and they viewed the newly created Supreme Court as a mutually agreed upon forum in which controversies between States could be fairly and impartially resolved. Allowing one State to determine that it can exercise jurisdiction over a sister State is flatly inconsistent with this constitutional plan.

As Nevada argued in *Hall*, "the Constitution implicitly establishes a Union in which the States are not free to treat each other as unfriendly sovereigns, but must respect the sovereignty of one another. While sovereign nations are free to levy

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[9] 4 J. Elliot's DEBATES, *supra* at 159 (statement of William Davie in the North Carolina convention), *quoted in Nevada v. Hall*, 440 U.S. at 435 (Rehnquist, J., dissenting); *see also Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 475 (1794) (Jay, C.J.); *South Carolina v. Regan*, 465 U.S. 367, 396 (1984) (O'Connor, J., concurring).

discriminatory taxes on the goods of other nations or to bar their entry altogether, the States of the Union are not. Nor are the States free to deny extradition of a fugitive when a proper demand is made by the executive of another State. And the citizens in each State are entitled to all privileges and immunities of citizens in the several States." 440 U.S. at 424-25 (footnotes omitted) (setting forth argument of Nevada). Nations at peace simply did not attempt to subject foreign sovereigns to the jurisdiction and compulsion of foreign courts. The unilateral assertion of such jurisdiction would have been "destructive of the independence, the equality, and dignity of the sovereign." *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 123 (1812). The relationship among the States of the Union demand the same mutual respect for dignity and sovereignty.

III.
THE STATES DID NOT SURRENDER THEIR IMMUNITY FROM SUIT IN THE COURTS OF OTHER STATES IN THE PLAN OF THE CONVENTION

Both the structure of the Constitution and its framing and ratification suggest not that the pre-constitutional immunity was surrendered, but rather the opposite – that to the extent it was considered, the intent was to maintain all existing state immunities from suit. The structure of the Constitution supports this conclusion by its treatment of the States as equal sovereigns. As this Court recently held:

> States, upon ratification of the Constitution . . . entered the Union "with their sovereignty intact." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). An integral component of that "residuary and inviolable sovereignty," The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison), retained by the States is their immunity from private suits.

FMC, 122 S. Ct. at 1870.

The delegation of certain types of disputes to a neutral federal forum also evidences a constitutional design which eschews resort to state courts for interstate disputes. This Court is granted original jurisdiction over disputes between States. Diversity cases and, where the Eleventh Amendment is not a bar, cases between a State and a citizen of another State may be brought in the lower federal courts. This design avoids the provincialism rampant in the period under the Articles of Confederation. *Hall,* 440 U.S. at 434 (Rehnquist, J. dissenting) (litigants were left to the state courts and to the provincialism that proved the bane of this country's earliest attempt at political organization). It defies logic to assume that this history led to the possibility that States, under the new federal system, would be amenable to suit in the courts of other States.

The passage of the Eleventh Amendment in response to the decision in *Chisolm v. Georgia* is consistent with this evidence. As both dissents in *Hall* pointed out, it also defies logic to assume that the States, by ratifying the Eleventh Amendment, would remove an entire class of cases from the neutral federal forum only to allow themselves to be sued in the courts of other States. *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting); *id.* at 437 (Rehnquist, J., dissenting). "The Eleventh Amendment is thus built on the postulate that States are not, absent their consent, amenable to suit in the courts of sister States." *Id.* at 437 (Rehnquist, J., dissenting). *See also Paulus v. South Dakota*, 227 N.W. 52, 55 (N.D. 1929) (In light of the States' Eleventh Amendment immunity from suit in federal court, "[m]uch less would it be consistent with any sound conception of sovereignty that a state might be haled into the courts of a sister sovereign state at the will or behest of citizens or residents of the latter.").

Furthermore, during the debates leading up to the ratification of the Constitution, the immunity of states from private suit was a topic of much discussion. As discussed in Part II, *supra*, although much of discussion centered on the proposed power of the federal judiciary, the language of the debates is absolute in character – and evinced no suggestion that the States

were surrendering any pre-existing immunity from suits in other States' courts. For example, in addition to the statements of Marshall and Madison quoted, *supra*, at 6, Edward Pendleton expressed this view at the Virginia Convention: "The impossibility of calling a sovereign state before the jurisdiction of another sovereign state, shows the propriety and necessity of vesting this tribunal with the decision of controversies to which a state shall be a party." 3 Elliot's DEBATES 549. Such declarations leave little doubt that the Framers were not surrendering their pre-existing immunity in other States' courts by ratifying the Constitution.

Finally, Justice Iredell's dissent in *Chisholm* provides still more evidence that the States did not surrender their immunity at the Convention.[10] Justice Iredell concluded that a "State is altogether exempt from the jurisdiction of the courts of the United States, *or from any other exterior authority,* unless in the special instances where the general government has power derived from the constitution itself." 2 Dall. at 448 (emphasis added). He had earlier expressed the same view – which is utterly inconsistent with the notion that the States surrendered their immunity at the Convention – in *Farquar's Executor v. Georgia*, Cir. Ct. D. Ga. 1791 (Iredell, J.): "The Constitution therefore seems to provide, that in cases where a State is a Party, the Supreme Court shall have original jurisdiction. . . . It may also fairly be presumed that the several States thought it important to stipulate that so awful & important a Trial should not be cognizable by any Court but the Supreme." Reprinted in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 148, 153-54 (Maeva Marcus, ed., 1994).

[10] The Court in *Alden* stated that "the views expressed by Hamilton, Madison, and Marshall during the ratification debates, and by Justice Iredell in his dissenting opinion in *Chisholm*, reflect the original understanding of the Constitution." 527 U.S. at 727.

IV.

RECOGNIZING STATES' IMMUNITY FROM PRIVATE SUITS BROUGHT IN THE COURTS OF OTHER STATES WOULD SERVE THE CORE INTERESTS UNDERLYING THE DOCTRINE OF SOVEREIGN IMMUNITY

In *Alden*, the Court observed that private money damages suits against nonconsenting States "may threaten the financial integrity of the States" and impose "substantial costs to the autonomy, the decisionmaking ability, and the ~~sovereign~~ capacity of the States." 527 U.S. at 750. Private suits against States in the courts of other States are no exception.

The threat to the States' fisc by private damages actions brought in sister States' courts is manifest. In this very case, respondent seeks compensatory damages, unspecified punitive damages, and attorney's fees against the State of California. A States' control of the public fisc is a core aspect of sovereignty. Any award of damages against a nonconsenting State infringes on the ability of that State's legislature to perform its basic function of managing the public treasuries.

Similarly, suits such as Hyatt's threaten the "more subtle risks" of subjecting state government "'to the mandates of judicial tribunals . . . and in favor of individual interests.'" *Alden*, 527 U.S. at 750 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887). As the Court elaborated in *Alden*:

> While the judgment creditor of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved by the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the

> Federal Government and invoked by the private citizen.

527 U.S. at 751. Those concerns fully apply to suits brought in the courts of other States (and to suits not mandated by the Federal Government).

Lastly, subjecting States to suits filed by private parties is inconsistent with "the dignity that is consistent with their status as sovereign entities." *FMC*, 535 U.S. at ___, 122 S. Ct. at 1874. In determining whether a State has sovereign immunity from suit in a particular forum, the Court has compared the "indignity" a nonconsenting State would suffer from being sued in that forum against the indignity suffered from suit in federal court. Thus, in *FMC*, the Court found that the "affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court." *Id.* at 1874 (footnote omitted). Nor does it lessen when the adjudication takes place in another State's courts. *See also Alden*, 527 U.S. at 749 ("Private suits against nonconsenting States . . . present the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties . . . regardless of the forum.") (internal quotations and citations omitted).

V.

PRINCIPLES OF *STARE DECISIS* ARE NOT A BARRIER TO OVERRULING *NEVADA V. HALL*

This Court has recognized three considerations as being particularly relevant when deciding whether to overrule one of its precedents: (1) "whether the rule has proven to be intolerable simply in defying practical workability"; (2) "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation"; and (3) "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854-55 (1992). These

considerations strongly militate in favor of overruling *Nevada v. Hall*.

Starting at the end (with the third consideration), the prior sections of this brief have demonstrated that *Nevada v. Hall* cannot be reconciled with the reasoning of *Seminole*, *Alden*, and *FMC*. *Hall* placed far too much weight on the literal words of the Eleventh Amendment and on the Framers' particular focus on the jurisdiction of the federal courts. *Seminole*, *Alden*, and *FMC* confirmed that the States possess an immunity from private suit that derives from the Constitution's structure – which itself derives from the Framers' understandings of the States' absolute immunity from private suits.

Nor can *Nevada v. Hall* even be reconciled with decisions predating it, which (unlike *Hall*) spoke about the States' sovereign immunity in broad terms that went well beyond the literal words of Eleventh Amendment. *See, e.g.*, *Beers v. Arkansas*, 20 How. 527, 529 (1858) ("It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission"); *Cunningham v. Macon & Brunswick R. Co.*, 109 U.S. 446, 451 (1883) ("It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant *in any court in this country* without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution").

Turning to the second consideration, it is doubtful that many (if any) private citizens have relied on their own States' willingness to entertain an action against another State. This Court has little need for concern that, due to reliance interests, overruling *Nevada v. Hall* will impose "a special hardship" or "inequity." It would certainly impose no more hardship than did overturning *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), in *Seminole*.

Finally, *Nevada v. Hall* has proven to be very impractical to implement. As discussed in the Amicus Brief of Oregon, *et al.*

supporting the petition for a writ of certiorari (at 7-9), state courts have construed *Hall* – particularly footnote 24 – in conflicting ways. Moreover, *Hall* rekindled the very tit-for-tat provincialism that concerned Justice Rehnquist in his dissent. 440 U.S. at 434. *See, e.g. Erlich-Bober v. University of Houston*, 404 N.E. 2d 726, 730 (Ct. App. N.Y. 1981) (New York's nonstatutory policy of preserving its status as the "pre-eminent commercial and financial nerve center of the Nation and the world" overrode Texas's statutory waiver of immunity which required suits against state agencies to be brought in certain counties even though New York statutes provided the same protection); and *K.D.F. v. Rex*, 878 S.W. 2d 589, 594 (Tex. 1994) ("We suppose that the courts of New York, applying this rationale, would not necessarily consider it appropriate for any state other than New York to exercise jurisdiction over another sovereign in a commercial dispute.").

Nevada v. Hall imposes considerable financial and dignitary costs upon the States that cannot be justified by the Constitution. It was wrong when decided, has not stood the test of time, and should be overruled.

CONCLUSION

The judgment of the Nevada Supreme Court should be reversed.

Respectfully submitted,

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No. 02-42

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In The
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT AND EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,

Respondents.

**On Writ Of Certiorari To The
Supreme Court Of The State Of Nevada**

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1. Complaint for Declaratory Relief and Damages, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, filed in the Eighth Judicial District of the State of Nevada, Clark County, Case No. A 382 999, on January 6, 1998;

2. Notice of Filing Removal Petition to the United States District Court, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, filed in the Eighth Judicial District of the State of Nevada, Clark County, Case No. A 382 999, on February 17, 1998;

3. Minutes of the Court Ordering Remand to Nevada District Court, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, filed in United States District Court, District of Nevada, Case No. CV-S-98-0284 HDM (LRL), dated May 1, 1998;

4. First Amended Complaint for Declaratory Relief and Damages, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, filed in the Eighth Judicial District of the State of Nevada, Clark County, Case No. A 382 999, on June 12, 1998;

5. Answer of Defendant Franchise Tax Board of the State of California to the First Amended Complaint for Declaratory Relief and Damages, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, filed in the Eighth Judicial District of the State of Nevada, Clark County, Case No. A 382 999, on August 13, 1998;

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7. Order Granting Partial Judgment On The Pleadings for Defendant Franchise Tax Board of the State of California, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, filed in the Eighth Judicial District of the State of Nevada, Clark County, Case No. A 382 999, on April 19, 1999;

8. District Court Order Adopting Discovery Commissioner's Report and Recommendation, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, in the Eighth Judicial District of the State of Nevada, Clark County, Case No. A 382 999, on December 27, 1999;

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10. Order Denying Motion For Summary Judgment of the Defendant Franchise Tax Board of the State of California, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, in the Eighth Judicial District of the State of Nevada, Clark County, Case No. A 382 999, filed on May 31, 2000;

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14. Oral Argument on Docket Nos. 35549 and 36390, in Franchise Tax Board of the State of California v. District Court (Real Party In Interest Gilbert P. Hyatt) Nevada Supreme Court on February 9, 2001;

15. Order Granting Petition (Docket No. 36390) and Dismissing Petition (Docket No. 35549), in Franchise Tax Board of the State of California v. District Court (Real Party In Interest Gilbert P. Hyatt) Nevada Supreme Court on June 13, 2001;

16. Petition for Rehearing, in Franchise Tax Board of the State of California v. District Court (Real Party In Interest Gilbert P. Hyatt) Nevada Supreme Court Docket No. 36390, filed on July 5, 2001;

17. Order Denying Motion to Vacate Protective Order, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, in the Eighth Judicial District of the

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19. Franchise Tax Board's Appeal Order re Protective Order, Gilbert P. Hyatt v. Franchise Tax Board of the State of California, Nevada Supreme Court Docket No. 39312, filed on March 4, 2002;

20. Order Granting Petition For Rehearing, Vacating Previous Order, Granting Petition for Writ of Mandamus in Part in Docket No. 36390, and Granting Petition for Writ of Prohibition in Part in Docket No. 35549. Order Denying Writ of Mandamus or Prohibition in Docket No. 39274, and Order Dismissing Appeal in Docket No. 39312, Franchise Tax Board of the State of California v. District Court (Real Party In Interest Gilbert P. Hyatt) Nevada Supreme Court, filed April 4, 2002.

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD

Your tax return has been selected for audit by the California Franchise Tax Board (FTB).

What should you expect from a Franchise Tax Board audit?

- Courteous treatment by FTB employees
- Clear and concise requests for information from the auditor assigned to your case
- Confidential treatment of any personal and financial information that you provide to us
- Completion of the audit within a reasonable amount of time

At the close of the audit, you will be told in writing that:

- We are accepting the return as you filed it, or
- You have additional tax due, or
- You have overpaid your tax and are entitled to a refund, or
- We have not changed your tax amount, but you may be entitled to a refund if you correctly recompute your tax and file a claim for a refund before the Statute of Limitation expires

Please see reverse side for additional information.

PRIVACY NOTICE

The Information Practices Act of 1977 and the federal Privacy Act require the Franchise Tax Board to tell you

why we ask you for information. The Operations and Compliance Divisions ask for tax return information to carry out the Personal Income Tax Law of the State of California. We may request additional information if we audit your return or take collection action.

If you meet the income requirements, the Revenue and Taxation Code requires you to file a return or statement in the form we prescribe (Sections 18401 and 18431). When you file these or other documents, you must include your social security number for identification and return processing (Section 18934).

It is mandatory to furnish all information requested when you are required to file a return or statement. If you do not file a return, or do not provide the information we ask for, or provide fraudulent information, the law says you may be charged penalties and interest and, in certain cases, you may be subject to criminal prosecution. We also may disallow claimed exemptions, exclusions, credits, deductions or adjustments. This could make the tax higher or delay or reduce any refund.

We may give the information you furnish us to the United States Internal Revenue Service, the proper official of any state imposing an income tax or a tax measured by income, the Multistate Tax Commission and to California government agencies and officials, as provided by law. If you owe any monies, we may disclose the amount due to employers, financial institutions, County Recorders, vacation trust funds, process agents and other payers.

You have a right to access records containing your personal information maintained by the Franchise Tax Board. The officials responsible for maintaining the information are: 1) Filing of returns – Director; Document Processing

Bureau; 2) Auditing of returns – Director, Personal Income Tax Audit Bureau; and 3) Collection of monies – Director, Enforcement Bureau. The address is: Franchise Tax Board, P.O. Box 942840, Sacramento, CA 94240-1040; telephone: (800) 852-5711.

What else should you know about your audit?

- You may represent yourself or have someone else represent you (with your proper authorization).
- It is to your benefit to respond to our requests for information both promptly and completely. Your failure to do so may result in the FTB adjusting your tax return and assessing penalties for not furnishing the information we requested.

If we propose any changes to your return, it is important that you understand the reason for the change. If you have any questions, contact the auditor assigned to your case. The telephone number is in the letter that we sent with this notice.

PLAINTIFF'S
EXHIBIT

FTB 05905
(18 pages)

STRATEGIC PLAN

A STATEMENT OF MAJOR ISSUES CONFRONTING THE FRANCHISE TAX BOARD AND THE STRATEGIES FOR ADDRESSING THEM

FRANCHISE TAX BOARD
STATE OF CALIFORNIA

January 1992

Message From The Executive Officer

The importance of planning at the Franchise Tax Board has never been greater than it is now. The issues which affect us are critical not only to our organization, but to the entire state. With severe fiscal problems, a highly diverse and rapidly growing population, unmet social needs and an uncertain economic future, our elected officials have turned to those of us who are responsible for administering the state's tax programs. We are expected to do all we can to ensure that tax dollars are promptly, effectively and efficiently collected to keep vital state programs and services running. Clearly this is not a new assignment, but it has now taken on an unprecedented level of urgency and attention.

To meet these expectations, we must have a well-thought-out-plan of action which not only responds to immediate problems in administering our programs, but anticipates future needs as well. I am pleased to present you with this new Strategic Plan which describes the major actions we must take in order to continue to successfully accomplish our vital mission.

In many ways, our preparation for today has been underway for a long time. Eleven years ago, we adopted a strategic planning process in anticipation of the kinds of important events and responsibilities now facing us. Three years ago, we included all employees in the distribution of the plan so all of us would know more about our most critical issue and our major strategies for addressing them. We also asked everyone to think about our mission, our shared organizational values and how each of us can contribute to getting the job done better.

This year, we conducted a review of our progress over the past two years in a series of "report cards," or status reports, which have been distributed to all employees in the form of a **"Supplement to the July 1989 Strategic Plan."** The reports took a new look at our strategic issues based on the experience we have gained. I believe all our planning experience has better prepared us to know what we must do, how we will do it and the role each of us must play.

I am confident that the outstanding talent and team spirit we have at FTB will enable us to fulfill the expectations and responsibilities assigned to us. There are many challenges before us. As is the case in any good team effort, everyone is an important player and everyone's contribution will count.

/s/ Gerald H. Goldberg
Gerald H. Goldberg
Executive Officer

January, 1992

Work Force - Issue Paper

[LOGO]

Issue

FTB must continue to be a highly effective and efficient revenue producing agency. In order to fulfill this responsibility, we need to continue and expand upon the efforts we have made to improve our recruitment, development, use and retention of a qualified work force.

Background

California has long been viewed as a desirable place to live and work. People with options in the labor market have chosen employment in our state for a variety of attractive reasons: good climate, excellent schools, affordable housing, a strong local economy and so forth. However, several recent developments have led some observers to conclude that California's "day in the sun" may be fading. In fact, one of the more disturbing reports claims that California is now among the least desirable places to live and work by those with employment options.

The evaluations of California's condition may or may not be accurate, but it is clear that our state is facing many challenges. Rapidly changing demographics, a sagging economy, and an unprecedented budget deficit are placing severe strains on the state's infrastructure and support services. Illegal-drugs, crime and domestic violence plague our communities. Our education systems face serious problems with extremely high student drop-out rates, low test scores, and classroom overcrowding. At the college level, fees have risen to rival costs in other states. At the same time, course offerings are being reduced and faculty laid off. Housing costs have also spiralled upward.

The four largest metropolitan areas in California are now among the most expensive markets in the nation based on median home prices. In the labor market, available skill levels have not kept pace with the needs of employers. In response, some organizations have introduced training programs to enhance the skill levels of their existing workers.

Recognizing the many challenges facing all California employers, FTB undertook a major effort beginning in 1989 "to remain competitive in the labor market and produce the quality products and services our customers need and expect." This effort included a department-wide review, revision and sharing of our mission and values. It also included changes to policies and procedures, the general work environment and the ways in which we communicate with each other and our customers.

In addition to internal changes, we became more actively involved in the communities around our largest offices. Involvement with local schools was initiated to improve the skills of our future workers. As the largest employer in Rancho Cordova, we became active participants in the Chamber of Commerce and the Transportation Management Association. Our continued involvement in these organizations supports their efforts to make the area a more attractive place to work and live. If successful, these efforts will assist us to recruit and maintain a qualified work force.

All of these changes were undertaken in recognition of the fact that our State, our work force and the way we do our work has changed and will continue to do so in the future. Events in California since 1989 have clearly supported the need and urgency for our actions. In the short term, the economic downturn means that many highly qualified people are looking for work. In the longer term, however, continued fiscal problems at

the state and local levels may mean that employment in the public sector will not be as attractive as it once was to many skilled job seekers.

Discussion

The current budget crisis in California has a mixed impact on FTB. Our primary mission as a tax revenue producer protects us from the more severe budget reductions required in other areas of state government. However, the demands for performance and efficiencies in revenue production are higher than they have ever been. The new systems being introduced to make us more efficient and effective will also require that we continue to retain and recruit the skilled workers needed to perform our increasingly complex jobs. At the same time, the competition for skilled workers will increase. Nationwide, for example, more new jobs are projected for business school and computer science graduates than there are students currently enrolled in those majors.

Our first responsibility as an organization continues to be getting our basic jobs done. We must collect the revenues needed to support state government in the most effective and efficient manner possible. We can only fulfill this responsibility if we are able to recruit and retain a qualified work force. Today, this clearly demands our being responsive to the changing skills, values, mix, and needs of our current and potential employees. In many ways, FTB's future performance will depend on our being viewed as a "good place to work." Our involvement in the community and improvements inside the organization will continue to be part of our overall strategies for fulfilling FTB's responsibilities.

Legislation – Issue Paper

[LOGO]

Issue

The increasing number, complexity and significance of proposed tax legislation require that we develop a greater capacity for the timely and accurate analysis of the proposals and the effective implementation of new laws.

Background

During the past several years, major tax law changes have been enacted at both the federal and state level. At the federal level, emphasis has been placed on reducing the federal deficit by increasing tax revenue without a general tax increase. This has been done through the enactment of new provisions which modify accounting practices, close "loopholes," and accelerate the collection of taxes.

At the state level, emphasis has been on keeping state income tax provisions in conformity with federal law, providing a favorable business climate, and maintaining a balanced budget. While in most recent years the budget has been balanced, in part, by enacting tax changes which close loopholes and accelerate revenue, the most recent budget balancing actions have resulted in actual tax increases.

The events of the past several years have led to the enactment of some of the most comprehensive and complex tax law changes in the state's history. The expertise of departmental staff has been relied on

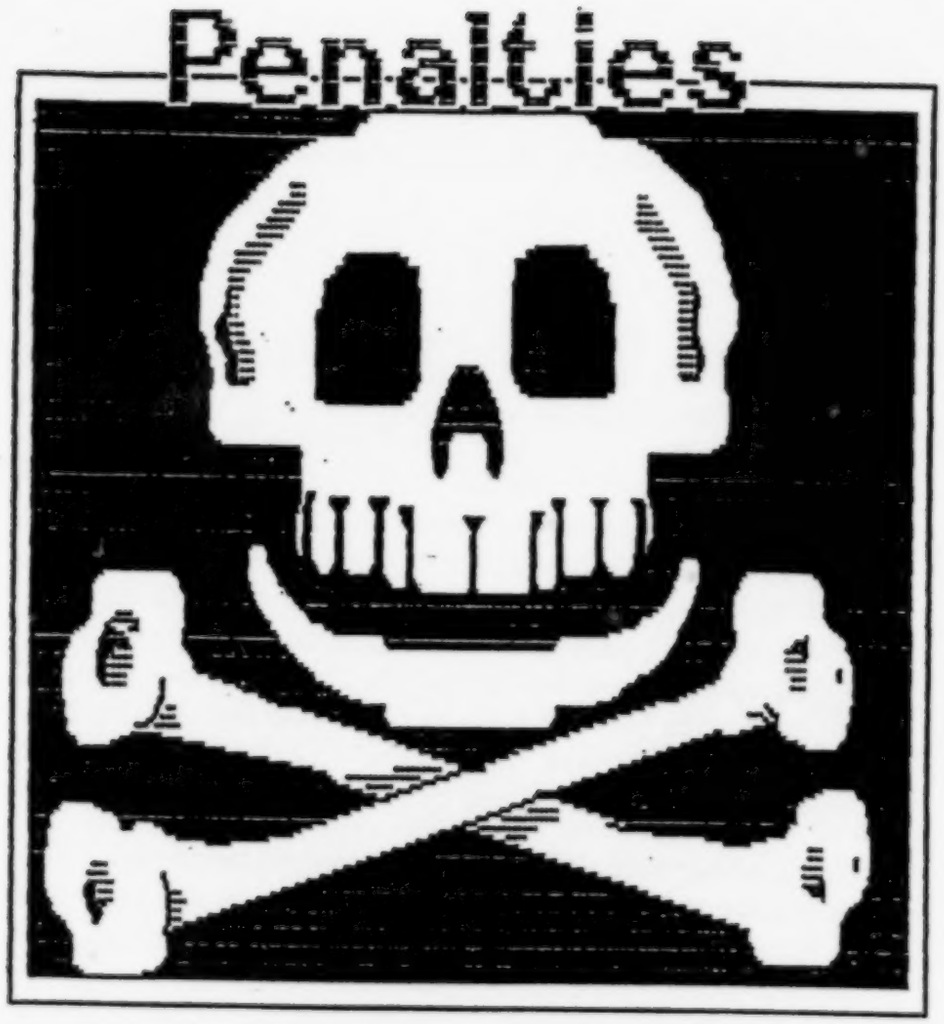
heavily to ensure the development of technically correct language, accurate analysis of the administrative and revenue impact of changes, and effective and efficient administration of the new laws.

Discussion

It is unlikely that the Legislature will be willing to raise taxes again in the near future even if California's economy does not significantly improve. Thus, the emphasis will almost certainly return to loophole closing, revenue acceleration and improving the level of compliance. This will not necessarily simplify the tax code. In fact, the introduction of complex tax law changes will undoubtedly continue. This will place additional pressures on the ability of the department to cope with the changes and provide the level of service our customers (taxpayers, the Legislature, and the Administration) have grown to expect.

Improving our ability to accurately analyze and implement tax law changes requires the continuation of a number of strategies and the development of new action plans. The major thrust of our plans will be on improving our technical knowledge and knowledge of the interaction of tax law on California citizens and business; improving our communications both inside and outside the department; gathering and using tax, financial and economic data effectively; and developing our staff abilities and expertise.

Penalties



Prepared by:

Larry Moy

Los Angeles District Office

August 31, 1993

Introduction

The responsibility for administering California's personal and bank & corporation income tax laws rests with the Franchise Tax Board. To assist the FTB with compliance, penalties were provided for in the state's tax laws.

The purpose of this class is twofold:

1. To make the auditors aware of the most common penalties present in the income tax laws.
2. To describe the situations or circumstances when we would enforce these penalties.

Benefits of Penalties to Auditors:

As stated above, a benefit of having penalties is to have compliance on the part of the taxpayers. As auditors, we know the value of having taxpayers or their representatives cooperate with our requests and demands. By properly using the full force of the penalties written into our tax laws we may better be able to get the taxpayers to be more cooperative.

Scope of the Class:

We will limit our discussion to the six penalties which I felt auditors would most likely come across while performing their jobs. The six penalties are:

1. Failure to File Return
2. Failure to Furnish Information
3. Substantial Understatement of Income Tax
4. Negligence or Disregard of Rules or Regulation
5. Fraud
6. Failure to Pay by Due Date

This discussion will focus on the treatment of these six penalties for the years between 1988-1991, inclusive. These years were selected since most auditors are working with returns filed for this time frame. Although we will concentrate on the six penalties mentioned above, a list of other penalties and a brief description of each is enclosed with this package beginning on page 19.

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue & Taxation Code
Section 19504 (formerly 19254(a) and 26423(a)*)

The People of the State of California to:

The Sports Authority
2620 Decatur Boulevard
Las Vegas, Nevada 89102

In the Matter of:
Gilbert P. Hyatt

Social Security No. : 069-30-9999
or Corporation No. :
For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of original application for membership.
2. Copy of any address changes submitted and date submitted.

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* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

3. Records of attendance.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: January 24, 1995

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

The People of the State of California to:

Nevada Development Authority
3900 Paradise Suite 155
Las Vegas, Nevada 89109

In the Matter of: Social Security No.: 069-30-9999
or Corporation No. :
Gilbert P. Hyatt For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in

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* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of application for membership in NDA.
2. Copy of any address changes submitted and date submitted.
3. Records of attendance at any meetings or functions.

[We cannot find any listings for Digital Nytronics or Gilbert Hyatt 10/91 /s/ Carrie Cooper]

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: January 24, 1995

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

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* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue &

(Continued on following page)

The People of the State of California to:

Nevada Development Authority
3900 Paradise Suite 155
Las Vegas, Nevada 89109

In the Matter of:	Social Security No. : 069-30-9999
	or Corporation No. :
Gilbert P. Hyatt	For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of application for membership in NDA.
2. Copy of any address changes submitted and date submitted.
3. Records of attendance at any meetings or functions.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: January 24, 1995

Telephone: (818) 556-2942

Taxation Code which caused some sections to be revised and renumbered.

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue & Taxation Code
Section 19504 (formerly 19254(a) and 26423(a)*)

The People of the State of California to:

Personal Computer Users Group
316 Bridger Avenue
Las Vegas, Nevada 89101

In the Matter of:	Social Security No. : 069-30-9999
	or Corporation No. :
Gilbert P. Hyatt	For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of application for membership and type of membership.
2. Copy of any address changes submitted and date submitted.

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* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Cha. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

3. Records of attendance at any meetings or functions.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: January 26, 1995

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

The People of the State of California to:

Temple Beth AM
4180 Pecos Road
Las Vegas, Nevada

In the Matter of: Social Security No. : 069-30-9999
or Corporation No. :
Gilbert P. Hyatt For the years :

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* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of application for membership and type of membership.
2. Copy of any address changes submitted and date submitted.
3. Records of attendance at any services, meetings, or functions.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: JaNUARy 26, 1995

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

The People of the State of California to:

Temple Beth Am
9001 Hill Point
Las Vegas, Nevada 89134

In the Matter of: Social Security No. : 069-30-9999
or Corporation No. :
Gilbert P. Hyatt For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of application for membership and type of membership.
2. Copy of any address changes submitted and date submitted.

* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

3. Records of attendance at any services, meetings, or functions.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: 2/17/95

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

The People of the State of California to:

Ms. Sherri lewis & Ms. Clara Kopp
c/o Wagon Trails Apartments
3225 South Pecos Road
Las Vegas, Nevada 89121

In the Matter of: Social Security No. : 069-30-9999
or Corporation No. :
Gilbert P. Hyatt For the years :

* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

Please provide copies of the following documents from the file of Gilbert Hyatt:

1. copy of rental application.
2. Copy of applicant's employer, previous address, closest relative, etc.
3. Copy of 30 day notice letter from Mr. Hyatt.
4. Copy of envelope in file postmarked December 8, 1991.
5. Copy of a report from maintenance after Mr. Hyatt vacated the apartment.
6. Copy of forwarding address given by Mr. Hyatt

FRANCHISF TAX BOARD

By: Sheila Cox
Authorized Representative

Dated: 3/10/95

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

The People of the State of California to:

Congrgation [sic] Ner Tamid
2761 Emerson Avenue
Las Vegas, Nevada 89121

In the Matter of: Social Security No. : 069-30-9999
or Corporation No. :
Gilbert P. Hyatt For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Please verify dates of any contributions made since 1991.
2. Copy of application for membership.

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* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

3. Copy of any address changes submitted and date submitted.

4. Records of attendance at any services, meetings, or functions.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: 3/23/95

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

The People of the State of California to:

Las Vegas Valley Water District
1001 S. Valley View Blvd.
Las Vegas, Nevada 89153

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* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

In the Matter of: Social Security No. : 069-30-9999
or Corporation No. :
Gilbert P. Hyatt For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copies of water bills (with the name of the person on whose account it was billed) at 7335 Tara, Las Vegas, Nevada for the following period:

   April 1992 to December 1992
   January 1993 to December 1993
   January 1994 to December 1994
   January 1995 to present

FRANCHISE TAX BOARD

By: Sheila Cox
Authorized Representative

Dated: 3/24/95

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

The People of the State of California to:

Silver State Disposal Service
770 E. Sahara Blvd.
Las Vegas, Nevada 89104

In the Matter of: Social Security No. : 069-30-9999
or Corporation No. :
Gilbert P. Hyatt For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copies of trash disposal bills (with the name of the person on whose account it was billed) at 7335 Tara Las Vegas, Nevada, for the following period:

April 1992 to December 1992
January 1993 to December 1993
January 1994 to December 1994
January 1995 to present

FRANCHISE TAX BOARD

By: Sheila Cox
Authorized Representative

Dated: 3/24/95

Telephone: (818) 556-2942

* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

The People of the State of California to:

Southwest Gas Corp.
P.O. Box 98512
Las Vegas, Nevada 89193-8512

In the Matter of: Social Security No. : 069-30-9999
or Corporation No. :
Gilbert P. Hyatt For the years :

* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copies of gas bills (with the name of the person on whose account it was billed) at 7335 Tara Las Vegas for the following period:

   April 1992 to December 1992
   January 1993 to December 1993
   January 1994 to December 1994
   January 1995 to present

FRANCHISE TAX BOARD

By: Sheila Cox
Authorized Representative

Dated: 3/24/95

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

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* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue &

(Continued on following page)

The People of the State of California to:

Las Vegas Sun
800 S. Valley View Blvd.
Las Vegas, Nevada 89153

In the Matter of: Social Security No. : 069-30-9999
or Corporation No. :
Gilbert P. Hyatt For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Indicate if the above individual has subscribed to the Las Vegas Sun during the period from 10/91 to the present. If yes, indicate the address that the subscription was sent to.

2. Was there a subscription to the Las Vegas Sun at 3225 S. Pecos apt. 237 during the period 11/91 – 4/92? If so, indicate the name of the person on whose account it was billed.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Taxation Code which caused some sections to be revised and renumbered.

Dated: 3/24/95

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
STE. 200
BURBANK, CA 91502-1170

556-2942

3/28/95

Clark County Department of Election
1860 E. Sahara Ave.
Las Vegas, Nevada 89104

For the purpose of administering the personal income tax law of the state of California and for that purpose only, we would appreciate your cooperation in providing photocopies of the following information about the person indicated below:

Name GILBERT P. HYATT
SSN: 069-30-9999
ADDRESS: 3225 S. Pecos Rd.
Las Vegas, Nevada 89121

1. Please send copies of any address changes submitted by the person listed above, including the dates of the changes.
2. Please list the dates of the elections in which the above individual voted, and whether an absentee ballot was used.

For your own convenience, you may make marginal notations on this letter and send it back in the stamped self-addressed envelope.

Thank you for your valuable cooperation in this matter. If you have any questions, please feel free to call.

Sheila Cox
Tax Auditor

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
STE. 200
BURBANK, CA 91502-1170

(818) 556-2942

April 12, 1995

Nevada Governor Robert Miller
555 E. Washington Avenue
Las Vegas, Nevada 89101

Dear Sir:

For the purposes of administering the California Personal Income Tax Law, and for that purpose only, the following information is requested under authorization of California Personal Income Law Section 19254.

Please indicate which dates Gilbert P. Hyatt visited your office and/or attended meetings or events to discuss international trade activity.

For your own convenience, you may make marginal notations on the extra copy of this letter and return it in the enclosed postage paid envelope.

Thank you for your valuable cooperation.

Sheila Cox
Tax Auditor
Telephone (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
STE. 2000
BURBANK, CA 91502-1170

(818) 556-2942

April 12, 1995

Nevada Senator Richard Bryan
300 S. Las Vegas Blvd.
Las Vegas, Nevada 89101

Dear Sir:

For the purposes of administering the California Personal Income Tax Law, and for that purpose only, the following information is requested under authorization of California Personal Income Law Section 19254.

Please indicate which dates Gilbert P. Hyatt visited your office and/or attended meetings or events to discuss international trade activity.

For your convenience, you may make marginal notations on the extra copy of this letter and return it in the enclosed postage paid envelope.

Thank you for your valuable cooperation.

Sheila Cox
Tax Auditor
Telephone (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

The People of the State of California to:

Las Vegas Sun
800 S. Valley View Blvd.
Las Vegas, Nevada 89153

In the Matter of:	Social Security No. : 069-30-9999
	or Corporation No. :
Gilbert P. Hyatt	For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

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* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

1. Indicate if the above individual has subscribed to the Las Vegas Sun during the period from 1991 to the present. If yes, please indicate the start and stop dates of service and the address that the subscription was sent to.

2. Indicate if there were any subscriptions to the Las Vegas Sun at 3225 S. Pecos Apt 237 during 1991-1992 and at 7335 Tara from 1992 to the present. If so, indicate the start and stop dates of service and name(s) of the person(s) on whose account it was billed.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: 8/4/95

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

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* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

The People of the State of California to:

Times Orange County
Times Mirror Square
Room 410
Los Angeles, CA 90053

In the Matter of:	Social Security No. : 069-30-9999
	or Corporation No. :
Gilbert P. Hyatt	For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Indicate if the above individual has subscribed to the Times Orange County during the period from 1991 to the present. If yes, please indicate the start and stop dates of service and the address that the subscription was sent to.

2. Was there a subscription to the Times Orange County at 7841 Jennifer Circle in La Palma during 1991 to the present? If so, indicate the start and stop dates of service and the name(s) of the person(s) on whose account it was billed.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: 8/4/95

Telephone: (818) 556-2942

STATE OF CALIFORNIA [LOGO]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD.,
SUITE 200
BURBANK, CA 91502-1170

DEMAND TO FURNISH INFORMATION
Authorized by
California Revenue &
Taxation Code
Section 19504 (formerly
19254(a) and 26423(a)*)

The People of the State of California to:

Orange County Register
625 N. Grand Ave.
Santa Ana, CA 92701

In the Matter of: Social Security No. : 069-30-9999
or Corporation No. :
Gilbert P. Hyatt For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

---

* Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

1. Indicate if the above individual has subscribed to the O.C. Register during the period from 1991 to the present. If yes, indicate the start and stop dates of service and the address that the subscription was sent to.

2. Was there a subscription to the O.C. Register at 7841 Jennifer Circle in La Palma during 1991 to present. If so, indicate the start and stop dates and the name of the person on whose account it was billed.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: 8/4/95

Telephone: (818) 556-2942

COMP
Thomas L. Steffen (1300)
Mark A. Hutchison (4639)
HUTCHISON & STEFFEN
530 South Fourth Street
Las Vegas, NV 89101
(702) 385-2500

Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff,	) Case No.) Dept. No.) Docket No.
vs.	)
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive Defendants.	) **COMPLAINT**) Jury Trial Demanded) Exempt from Arbitration:) Declaratory Relief, Significant) Public Policy and Amount in Excess Of $40,000) (Filed Jan. 6, 98)

Plaintiff, Gilbert P. Hyatt, complains against defendants, and each of them, as follows:

PARTIES

1. Plaintiff resides in Clark County, Nevada and has done so since September 26, 1991.

2. Defendant Franchise Tax Board of the State of California (hereinafter "FTB") is a governmental agency of the State of California with its principal office located in Sacramento, California, and a district office located in Los Angeles, California. The FTB's function is to ensure the collection of state income taxes from California residents and from income earned in California by non-residents.

3. The identity and capacities of the defendants designated as Does 1 through 100 are so designated by plaintiff because of his intent by this complaint to include as named defendants every individual or entity who, in concert with the FTB as an employee, representative, agent or independent contractor, committed the tortious acts described in his complaint. The true names and capacities of these Doe defendants are presently known only to the FTB, who committed the tortious acts in Nevada with the assistance of said Doe defendants who are designated by fictitious names only until plaintiff is able, through discovery, to obtain their true identities and capacities; upon ascertaining the true names and capacities of these Doe defendants, plaintiff shall promptly amend this complaint to properly name them by their actual identities and capacities. For pleading purposes, whenever this complaint refers to "defendants," it shall refer to these Doe defendants, whether individuals, corporations or other forms of associations or entities, until their true names are added by amendment along with particularized facts concerning their conduct in the commission of the tortious acts alleged herein.

4. Plaintiff is informed and believes, and on that basis alleges, that defendants, in acting or omitting to act as alleged, acted or omitted to act within the course and scope of their employment or agency, and in furtherance of

their employer's or principal's business, whether the employer or principal be FTB or some other governmental agency or employer or principal whose identity is not yet known; and that FTB and defendants were otherwise responsible and liable for the acts and omissions alleged herein.

5. This action is exempt from the court-annexed arbitration program, pursuant to Rule 3, because: (1) this is an action for, *inter alia*, declaratory relief; (2) substantial issues of public policy are implicated concerning the sovereignty of the State of Nevada and the integrity of its territorial boundaries as opposed to governmental agencies of another state who enter Nevada in an effort to extraterritorially, arbitrarily and deceptively enforce their policies, rules and regulations on residents of Nevada in general, and plaintiff Gilbert P. Hyatt in particular; and (3) the sums of money and damages involved herein far exceed the $40,000.00 jurisdictional limit of the arbitration program.

6. Plaintiff hereby requests a jury trial for his Second, Third, Fourth, and Fifth Causes of Action.

SUMMARY OF CLAIMS

7. Plaintiff, by this action, seeks: (1) declaratory relief under NRS 30.010 *et seq.* to confirm plaintiff's status as a Nevada resident effective as of September 26, 1991 and continuing to the present and, correspondingly, his non-residency during said period in California; (2) recovery of compensatory and punitive damages against the FTB and the defendants for invasion of plaintiff's right of privacy resulting from their investigation in Nevada of plaintiff's residency, domicile and place of abode and

causing (a) an unreasonable intrusion upon plaintiff's seclusion, (b) an unreasonable publicity given to private facts, and (c) casting plaintiff in a false light; and (3) recovery of compensatory and punitive damages against the FTB and the defendants for their outrageous conduct in regard to their investigation in Nevada of plaintiff's residency, domicile and place of abode. The claims specified in this paragraph constitute five separate causes of action as hereinafter set forth in this complaint.

FACTUAL BACKGROUND

Plaintiff's Residency in Nevada

8. Plaintiff moved to the State of Nevada, County of Clark, and established full-time residency here on September 26, 1991 and has remained a full-time permanent resident since that time. Prior to his relocation to Nevada, plaintiff resided in Southern California. Plaintiff is a highly successful inventor. Specifically, plaintiff has been granted numerous important patents for a wide range of inventions relating to computer technology. Plaintiff primarily works alone in the creation and development of his inventions and greatly values his privacy both in his personal life and business affairs. After certain of his important inventions were granted patents in 1990, plaintiff began receiving a great deal of unwanted and unsolicited publicity, notoriety and attention. To greater protect his privacy, to enjoy the social, recreational, and financial advantages Nevada has to offer, and to generally enhance the quality of his life and environment, plaintiff relocated to Nevada on September 26, 1991. This move took place after much consideration and almost an entire year of planning.

9. The following events are indicative of the fact that on September 26, 1991, plaintiff commenced both his residency and intent to remain in Nevada, and a continuation of both down to the present: (1) the sale of plaintiff's California home in October 1991; (2) his renting and residing at an apartment in Las Vegas commencing in October 1991 and continuing until April 1992 when plaintiff closed the purchase of a home in Las Vegas; (3) in November 1991, plaintiff registered to vote in Nevada, obtained a Nevada driver's license, and joined a religious organization in Las Vegas; (4) plaintiffs' extensive search, commencing in December 1991, for a new home in Las Vegas, and in the process utilizing the services of various real estate brokers; (5) during the process of finding a home to purchase, plaintiff made numerous offers to buy; (6) plaintiff's purchase of a new home in Las Vegas on April 3, 1992; (7) plaintiff maintained and expanded his business interests from Las Vegas; and (8) plaintiff has, through the years from September 26, 1991 and down to the present, contacted persons in high political office, in the professions, and other walks of life, as a true Nevada resident of some renown would, not concealing the fact of his Nevada residency. In sum, plaintiff has substantial evidence, both testimonial and documentary, in support of the fact of his full-time residency, domicile and place of abode in Nevada commencing on September 26, 1991 and continuing to the present.

THE FTB and Defendants' Investigation of Plaintiff in Nevada

10. Because plaintiff was a resident of California for part of 1991, plaintiff filed a Part-Year state income tax return with the State of California for 1991 (the "1991

Return"). Said return reflects plaintiff's payment of state income taxes to California for income earned during the period of January 1 through September 26, 1991.

11. In or about June of 1993 – 21 months after plaintiff moved to Nevada – for reasons that have never been specified, but are otherwise apparent, the FTB began an audit of the 1991 Return. In or about July of 1993, as part of its audit, the FTB began to investigate plaintiff by making or causing to be made numerous and continuous contacts directed at Nevada. Initially, the FTB sent requests to Nevada government agencies for information concerning plaintiff – a paper foray that continued for the next several years.

12. In or about January of 1995, FTB auditors began planning a trip to Las Vegas, the purpose of which was to enhance and expand the scope of their investigation of plaintiff. In March of 1995, the FTB and defendants commenced a "hands on" investigation of plaintiff that included unannounced confrontations and questioning about private details of plaintiff's life. These intrusive activities were directed at numerous residents of Nevada, including plantiff's current and former neighbors, employees of businesses and stores frequented by plaintiff, and alas, even his trash collector!

13. Both prior and subsequent to the intrusive, "hands on" investigations described in paragraph 12, above, the FTB propounded to numerous Nevada business and professional entities and individual residents of Nevada "quasi-subpoenas" entitled "Demand to Furnish Information" which cited the FTB's authority under California law to issue subpoenas and demanded that the recipients thereof produce the requested information

concerning plaintiff. Plaintiff is informed and believes, and therefore alleges, that the FTB never sought permission from a Nevada court or any Nevada government agency to send such "quasi-subpoenas" into Nevada where, induced by the authoritative appearance of the inquisitions, many Nevada residents and business entities did respond with answers and information concerning plaintiff.

14. Subsequent to the documentary and "hands on" forays into Nevada by the FTB and defendants, the FTB also sent correspondence, rather than "quasi-subpoenas," to Nevada Governor Bob Miller, Nevada Senator Richard Bryan and other government officials and agencies seeking information regarding plaintiff and his residency in Nevada. Plaintiff is further informed and believes, and therefore alleges, that the FTB intentionally sent unauthorized "quasi-subpoenas" (i.e., "Demand to Furnish Information") to private individuals and businesses in a successful attempt to coerce their cooperation through deception and the pretense of an authoritative demand, while on the other hand, sending respectful letter requests for information to Nevada governmental agencies and officials who undoubtedly would have recoiled at the attempt by the FTB to exercise extraterritorial authority in Nevada through the outrageous means of the bogus subpoenas.

15. Plaintiff neither authorized the FTB's aforementioned documentary and pretentious forays into Nevada, nor was plaintiff ever aware that such information was being sought in such a manner until well after the "quasi-subpoenas" had been issued and the responses received. Similarly, plaintiff had no knowledge of the FTB and defendants' excursions to Las Vegas to investigate plaintiff or the FTB's correspondence with Nevada government

agencies and officials until well after such contacts had taken place. Upon information and belief, plaintiff alleges that all of the above-described activities were calculated to enable the FTB to develop a colorable basis for assessing a huge tax against plaintiff despite the obvious fact that the FTB was proceeding against a bona fide resident of Nevada.

Assessment for 1991

16. On April 23, 1996, after the FTB had completed its audit and investigation of the 1991 Return, the FTB sent a Notice of Proposed Assessment (i.e., a formal notice that taxes are owed) to plaintiff in which the FTB claimed plaintiff was a resident of California – not Nevada – until April 3, 1992. The FTB therefore assessed plaintiff California state income tax for the period of September 26 through December 31 of 1991 in a substantial amount. Moreover, the FTB also assessed a penalty against plaintiff in an amount almost equal to the assessed tax after summarily concluding that plaintiff's non-payment of the assessed tax, based upon his asserted residency in Nevada and non-residency in California, was fraudulent.

17. Plaintiff, who demonstrably is and was at all times pertinent hereto, a bona fide resident of Nevada should not be forced into a California forum to seek relief from the unjust and tortious attempts by the FTB to extort unlawful taxes from this Nevada resident. Plaintiff avers that the manufactured issue of his residency in Nevada for the period of September 26 through December 31 of 1991 should be determined in Nevada, the state of plaintiff's residence. The FTB is in effect attempting to impose an "exit tax" on plaintiff by coercing him into administrative

procedures and possible future court action in California. The FTB has arbitrarily, maliciously and without support in law or fact, asserted that plaintiff remained a California resident until he purchased and closed escrow on a new home in Las Vegas on April 3, 1992. In a word, the FTB's prolonged and monumental efforts to find a way – any way – to effectively assess additional income taxes against plaintiff after he changed his residency from California to Nevada is based upon governmental greed arising from the FTB's eventual awareness of the financial success plaintiff has realized since leaving California and becoming a bona fide resident of the State of Nevada. The aforesaid date of Nevada residency accepted by the FTB with respect to the 1991 Report is over six months after plaintiff moved to Nevada with the intent to stay and began, he thought, to enjoy all the privileges and advantages of residency in his new state.

The FTB's Continuing Pursuit of Plaintiff in Nevada

18. On or about April 1, 1996, plaintiff received formal notice that the FTB had commenced an investigation into the 1992 tax year and that its tentative determination was that plaintiff would also be assessed California state income taxes for the period of January 1 through April 3 of 1992.

19. On or about April 10, 1997 and May 12, 1997 respectively, plaintiff received notes from the FTB that it would be issuing a formal "Notice of Proposed Assessment" in regard to the 1992 tax year in which it will seek back taxes from plaintiff for income earned during the period of January 1 through April 2, 1992 and in addition would

seek penalties for plaintiff's failure to file a state income tax return for 1992.

20. Prior to the FTB sending the formal Notice of Proposed Assessment for the 1992 tax year, a representative of the FTB stated to one of plaintiff's representatives that disputes over such assessments by the FTB always settle at this stage as taxpayers do not want to risk their personal financial information being made public. Plaintiff understood this statement to be a strong suggestion by the FTB that he settle the dispute by payment of some portion of the assessed taxes and penalties. Plaintiff refused, and continues to refuse to do so, as he has not been a resident of California since his move to Nevada on September 26, 1991, and it remains clear to him that the FTB is engaging in its highhanded tactics to extort "taxes and penalties" from him that he does not legally or morally owe.

21. On or about August 14, 1997, plaintiff received a formal Notice of Proposed Assessment for 1992. Despite the FTB's earlier written statements and findings that plaintiff became a Nevada resident at least as of April 3, 1992 and its statement in such Notice of Proposed Assessment that "We [the FTB] consider you to be a resident of this state [California] through April 2, 1992," such notice proceeded to assess California state income taxes on plaintiff's income for the entire year of 1992. Specifically, the FTB assessed plaintiff state income taxes for 1992 in an amount five times greater than that for 1991, assessed plaintiff a penalty almost as great as the assessed tax for alleged fraud in claiming he was a Nevada resident during 1992, and stated that interest accrued through August 14, 1997 (roughly the equivalent of the penalty) was also owed on the assessed tax and penalty. In short, the State of California, through the FTB, sent plaintiff a bill for the

entire 1992 tax year, which was fourteen times the amount of tax it initially assessed for 1991, and in so doing asserted that plaintiff was "a California resident for the entire year." Without explanation the FTB ignored its earlier finding and written acknowledgment that plaintiff was a Nevada resident at least as of April 3, 1992. This outrage is a transparent effort to extort substantial sums of money from a Nevada resident.

22. Plaintiff is informed and believes, and therefore alleges, that the FTB intends to engage in a repeat of the "hands on," extraterritorial investigations directed at plaintiff within the State of Nevada in an effort to conjure up a colorable basis for justifying its frivolous, extortionate Noticed of Proposed Assessment for the 1992 tax year.

23. Plaintiff is informed and believes, and therefore alleges, that the FTB may continue to assess plaintiff California state income taxes for the years 1993, 1994, 1995, 1996 and beyond since the FTB has now disregarded its own conclusion regarding plaintiff's residency in Nevada as of April 3, 1992, and is bent on charging him with a staggering amount of taxes, penalties and interest irrespective of his status as a bona fide resident of Nevada. It appears from its actions concerning plaintiff, that the FTB has embraced a new theory of a liability that in effect declares "once a California resident always a California resident" as long as the victim continues to generate significant amounts of income. Thus, the FTB has raised an invisible equivalent of the iron curtain that prohibits such residents from ever leaving the taxing jurisdiction of the FTB.

The FTB's Motive

24. Plaintiff is informed and believes, and therefore alleges, that the FTB has no credible, admissible evidence that plaintiff was a California resident at anytime after September 1, 1991, despite the FTB's exhaustive extraterritorial investigations in Nevada. The FTB has acknowledged in its own reports that plaintiff sold his California home on October 1, 1991, that plaintiff rented an apartment in Las Vegas from November 1991 until April 1992 and that plaintiff purchased a home in Las Vegas in April 1992.

25. Plaintiff is informed and believes, and therefore alleges, that the assessments by the FTB against plaintiff for 1991 and 1992 result from the fact that almost two years after plaintiff moved from California to Nevada an FTB investigator read a magazine article about plaintiff's wealth and the FTB thereafter launched its investigation in the hope of extracting a significant settlement from plaintiff. Plaintiff is further informed and believes, and therefore alleges, that the FTB has assessed a fraud penalty against plaintiff for the 1991 tax year and issued a Notice of Proposed Assessment assessing plaintiff for the entire 1992 tax year and a fraud penalty for the same year to intimidate plaintiff and coerce him into paying some significant amount of tax for income earned after September 26, 1991, despite its awareness that plaintiff actually became a Nevada resident at that time. Plaintiff alleges that the FTB's efforts to coerce plaintiff into sharing his hard-earned wealth despite having no lawful basis for doing so, constitutes malice and oppression.

Jurisdiction

26. This Court has personal jurisdiction over the FTB pursuant to Nevada's "long-arm" statute, NRS 14.065 *et seq.*, because of the FTB's tortious extraterritorial contacts and investigatory conduct within the State of Nevada ostensibly as part of its auditing efforts to undermine plaintiff's status as a Nevada resident, but in reality to create a colorable basis for maintaining that plaintiff continued his residency in California during the period September 26, 1991 to December 31, 1991 and beyond.

27. Plaintiff is informed and believes, and therefore alleges, that the FTB has a pattern and practice of entering into Nevada to investigate Nevada residents who were formerly residents of California, and then assessing such residents California state income taxes for time periods subsequent to the date when such individuals moved to and established residency in Nevada.

FIRST CAUSE OF ACTION

(For Declaratory Relief)

28. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27 above, as though set forth herein verbatim.

29. Pursuant to California law, in determining whether an individual was a resident of California for a certain time period thereby making such individual's income subject to California state income tax during such period, the individual must have been either domiciled in California during such period for "other than a temporary or transitory purpose." *See* Cal. Rev. & Tax Code § 17014.

The FTB's own regulations and precedents require that it apply certain factors in determining an individual's domicile and/or whether the individual's presence in California (or outside of California) was more than temporary or transitory.

(a) Domicile.

Domicile is determined by the individual's physical presence in California with intent to stay or if absent temporarily from California an intent to return. Such intent is determined by the acts and conduct of the individual such as: (1) where the individual is registered to vote and votes; (2) location of the individual's permanent home; (3) comparative size of homes maintained by the individual in different states; (4) where the individual files federal income tax returns; (5) comparative time spent by the individual in different states; (6) cancellation of the individual's California homeowner's property tax exemption; (7) obtaining a driver's license from another state; (8) registering a car in another state; (9) joining religious, business and/or organizations in another state; and (10) establishment of a successful business in another state by an individual who is self-employed.

(b) Temporary or Transitory Purpose.

The following contacts which are similar although not identical to those used to determine docimile are important in determining whether an individual was in California (or left California) for a temporary or transitory purpose: (1) physical presence of the individual in California in comparison to the other state or states; (2) establishment of a successful business in another state by an

individual who is self employed; (3) extensive business interest outside of California and active participation in such business by the individual; (4) banking activity in California by the individual is given some, although not a great deal of, weight; (5) rental of property in another state by the individual; (6) cancellation of the individual's California homeowner's property tax exemption; (7) hiring professionals by the individual located in another state; (8) obtaining a driver's license from another state; (9) registering a car in another state; (10) joining religious, business and/or social organizations in another state; and (11) where the individual is registered to vote and votes.

30. The FTB's assessment of taxes and a penalty for 1991 is based upon the FTB's conclusion in the first instance that plaintiff did not become a resident of Nevada until April 3, 1992, the date on which plaintiff closed escrow on a new home in Las Vegas. In coming to such a conclusion, the FTB discounted or refused to consider a multitude of evidentiary facts which contradicted the FTB's conclusion, and were the type of facts the FTB's own regulations and precedents require it to consider. Such facts, include, but are not limited to, the following: (1) plaintiff sold his California home on October 1, 1991; (2) plaintiff rented and resided at an apartment in Las Vegas from October 1, 1991 until April of 1992; (3) plaintiff registered to vote, obtained a Nevada's driver's license (thereby relinquishing his California driver's license), and joined a Las Vegas religious organization in November of 1991; (4) plaintiff terminated his California home owner's exemption effective October 1, 1991; (5) plaintiff began actively searching for a house to buy in Las Vegas, and submitted numerous offers on houses in Las Vegas, commencing in December of 1991; (6) plaintiff's offer to

purchase a home in Las Vegas was accepted in March of 1992 and escrow closed on such purchase on April 3, 1992; and (7) plaintiff's new home in Las Vegas was substantially larger than the home in Southern California, which he sold in October of 1991.

31. An actual controversy exists to whether plaintiff was a full-time resident of Nevada – not California – commencing on September 26, 1991 through December 31, 1991 and continuing thereafter through the year 1992 and beyond. Plaintiff contends that under either Nevada or California law, or both, he was a full-time, bona fide resident of Nevada throughout the referenced periods and down to the present, and that the FTB ignored its own regulations and precedents in finding to the contrary, and that the FTB has no jurisdiction to impose a tax obligation on plaintiff during the contested periods. Plaintiff also contends that the FTB had no authority to conduct an extraterritorial investigation of plaintiff in Nevada and no authority to propound "quasi-subpoenas" to Nevada residents and businesses, thereby seeking to coerce the cooperation of said Nevada residents and businesses through an unlawful and tortious deception, to reveal information about plaintiff. Plaintiff is informed and believes, and therefore alleges, that the FTB contends in all respects to the contrary.

32. Plaintiff therefore requests judgment of this Court declaring and confirming plaintiff's status as a full-time bona fide resident of the State of Nevada effective from September 26, 1991 to the present; and for judgment declaring the FTB's extraterritorial investigatory excursions into Nevada, and the submission of "quasi-subpoenas" to Nevada residents without approval from a Nevada court or governmental agency, as alleged above, to

be without authority and violative of Nevada's sovereignty and territorial integrity.

SECOND CAUSE OF ACTION

(For Invasion of Privacy – Unreasonable Intrusion Upon The Seclusion of Another)

33. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, and 29 through 31, above, as though set forth herein verbatim.

34. Plaintiff is informed and believes, and therefore alleges, that neighbors, businesses, government officials and others within Nevada with whom plaintiff has had and would reasonably expect in the future to have social or business interactions, were approached and questioned by the FTB and defendants who disclosed or implied that plaintiff was under investigation in California, and otherwise acted in such a manner as to cause doubts to arise concerning plaintiff's integrity and moral character. Moreover, as part of the audit/investigation in regard to the 1991 Return, plaintiff turned over to the FTB highly personal and confidential information with the understanding that it would remain confidential. The FTB even noted in its own internal documentation that plaintiff had a significant concern in regard to the protection of his privacy in turning over such information. At the time this occurred, plaintiff was still hopeful that the FTB was actually operating in good faith, a proposition that, as noted throughout this complaint, proved to be utterly false.

35. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants nevertheless violated

plaintiff's right to privacy in regard to such information by revealing it to third parties and otherwise conducting an investigation in Nevada through which the FTB and defendants revealed to third parties personal and confidential information, which plaintiff had every right to expect would not be revealed to such parties.

36. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants' extensive probing and investigation of plaintiff, including their actions both occurring within Nevada and directed to Nevada from California, were performed with the intent to harass, annoy, vex, embarrass and intimidate plaintiff such that he would eventually enter into a settlement with the FTB concerning his residency during the disputed time periods and the taxes and penalties allegedly owed. Such conduct by the FTB and defendants did in fact harass, annoy, vex and embarrass Hyatt, and syphon his time and energies from the productive work in which he is engaged.

37. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants through their investigative actions, and in particular the manner in which they were carried out in Nevada, intentionally intruded into the solitude and seclusion which plaintiff had specifically sought by moving to Nevada. The intrusion by the FTB and defendants was such that any reasonable person, including plaintiff, would find highly offensive.

38. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in total amount in excess of $10,000.

39. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion was despicable conduct by the FTB and defendants entered into with a willful and conscious disregard of plaintiff's rights, and the efficacious intent to cause him injury. Plaintiff is therefore entitled to an award of punitive damages against the FTB and defendants in an amount sufficient to satisfy the purpose for which such damages are awarded.

THIRD CAUSE OF ACTION

(For Invasion of Privacy – Unreasonable Publicity Given to Private Facts)

40. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, and 34 through 37, above, as though set forth herein verbatim.

41. As set forth above, plaintiff revealed to the FTB highly personal and confidential information at the request of the FTB as an ostensible part of its audit and investigation into plaintiff's residency during the disputed time periods. Plaintiff had a reasonable expectation that said information would be kept confidential and not revealed to third parties and the FTB and defendants knew and understood that said information was to be kept confidential and not revealed to third parties.

42. The FTB and defendants, without necessity or justification, nevertheless disclosed to third parties in Nevada certain of plaintiff's personal and confidential information which had been cooperatively disclosed to the

FTB by plaintiff only for the purposes of facilitating the FTB's legitimate auditing and investigative efforts.

43. As a direct, proximate, and foreseeable result of the FTB's aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

44. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion constituted despicable conduct by the FTB and defendants entered into with a willful and conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of punitive or exemplary damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

FOURTH CAUSE OF ACTION

(For Invasion of Privacy – Casting Plaintiff in a False Light)

45. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, and 41 and 42, above, as if set forth herein verbatim.

46. By conducting interviews and interrogations of Nevada residents and by issuing unauthorized "Demands to Furnish Information" as part of their investigation in Nevada of plaintiff's residency, the FTB and defendants invaded plantiff's right to privacy by stating or insinuating to said Nevada residents that plaintiff was under investigation in California, thereby falsely portraying plaintiff as

having engaged in illegal and immoral conduct, and decidedly casting plaintiff's character in a false light.

47. The FTB and defendants' conduct in publicizing its investigation of plaintiff cast plaintiff in a false light in the public eye, thereby adversely compromising the attitude of those who know or would, in reasonable likelihood, come to know Gil Hyatt because of the nature and scope of his work. Such publicity of the investigation was offensive and objectionable to plaintiff and was carried out for other than honorable, lawful, or reasonable purposes. Said conduct by the FTB and the defendants was calculated to harm, vex, annoy and intimidate plaintiff, and was not only offensive and embarrassing to plaintiff, but would have been equally so to any reasonable person of ordinary sensibilities similarly situated, as the conduct could only serve to damage plaintiff's reputation.

48. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned invasion of plaintiff's privacy, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

49. Plaintiff is informed and believes, and therefore alleges, that said invasion of plaintiff's privacy was intentional, malicious, and oppressive in that such invasion of privacy was despicable conduct by the FTB and defendants, entered into with a willful and conscious disregard of the rights of plaintiff. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

FIFTH CAUSE OF ACTION

(For The Tort of Outrage)

50. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 27, 29 through 31, 34 through 37, 41 and 42, and 46 and 47, above, as if set forth herein verbatim.

51. The clandestine and reprehensible manner in which the FTB and defendants carried out their investigation in Nevada of plaintiff's Nevada residency under the cloak of authority from the State of California, but without permission from the State of Nevada, and the FTB and defendants' apparent intent to continue to investigate and assess plaintiff staggeringly high California state income taxes, interest, and penalties for the entire year of 1992 – and possibly continuing into future years – despite the FTB's own finding that plaintiff was a Nevada resident at least as of April of 1992, was, and continues to be, extreme, oppressive and outrageous conduct. The FTB has, in every sense, sought to hold plaintiff hostage in California, disdaining and abandoning all reason in its reprehensible, all-out effort to extort significant amounts of plaintiff's income without a basis in law or fact. Plaintiff is informed and believes, and therefore alleges, that the FTB and defendants carried out their investigation in Nevada for the ostensible purpose of seeking truth concerning his place of residency, but the true purpose of which was to so harass, annoy, embarrass, and intimidate plaintiff, and to cause him such severe emotional distress and worry as to coerce him into paying significant sums to the FTB irrespective of his demonstrably bona fide residence in Nevada throughout the disputed periods. As a result of such

extremely outrageous and oppressive conduct on the part of the FTB and defendants, plaintiff has indeed suffered fear, grief, humiliation, embarrassment, anger, and a strong sense of outrage that any honest and reasonably sensitive person would feel if subjected to equivalent unrelenting, outrageous personal threats and insults by such powerful and determined adversaries.

52. As a direct, proximate, and foreseeable result of the FTB and defendants' aforementioned extreme, unrelenting, and outrageous conduct, plaintiff has suffered actual and consequential damages in a total amount in excess of $10,000.

53. Plaintiff is informed and believes, and therefore alleges, that said extreme, unrelenting, and outrageous conduct was intentional, malicious, and oppressive in that it was despicable conduct by the FTB and defendants, entered into with a willful and conscious disregard of plaintiff's rights. Plaintiff is therefore entitled to an award of exemplary or punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded.

WHEREFORE, plaintiff respectfully prays for judgment against the FTB and defendants as follows:

FIRST CAUSE OF ACTION

1. For judgment declaring and confirming that plaintiff is a bona fide resident of the State of Nevada effective as of September 26, 1991 to the present;

2. For judgment declaring that the FTB has no lawful basis for continuing to investigate plaintiff in Nevada concerning his residency between September 26,

1991 through December 31, 1991 or any other subsequent period down to the present, and declaring that the FTB had no right or authority to propound or otherwise issue a "Demand to Furnish Information" or other quasi subpoenas to Nevada residents and businesses seeking information concerning plaintiff;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

SECOND CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

THIRD CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys fees; and

5. For such other and further relief as the Court deems just and proper.

FOURTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys fees; and

5. For such other and further relief as the Court deems just and proper.

FIFTH CAUSE OF ACTION

1. For actual and consequential damages in a total amount in excess of $10,000;

2. For punitive damages in an amount sufficient to satisfy the purposes for which such damages are awarded;

3. For costs of suit;

4. For reasonable attorneys' fees; and

5. For such other and further relief as the Court deems just and proper.

DATED this 6th day of January, 1998.

HUTCHISON & STEFFEN

By: /s/ Mark A. Hutchison
Thomas L. Steffen
Mark A. Hutchison
530 South 4th Street
Las Vegas, Nevada 89101

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

GILBERT P. HYATT, Plaintiff, v. CALIFORNIA FRANCHISE TAX BOARD, Defendant.	)	CV-*S-98-00248-HDM(LRL)*

ORDER CONCERNING REMOVAL

(Filed Feb. 19, 1998)

To all parties removing actions to this Court:

You must, no later than fifteen days from the date hereof, file and serve a signed statement under the case and caption that sets forth the following information:

1. The date(s) on which you first received a copy of the summons and complaint in the removed action.

2. The date(s) on which you were served with a copy of the summons and complaint, if any of those dates are different from the date(s) set forth in item number 1.

3. In removals based on diversity jurisdiction, the names of any served defendants who are citizens of Nevada, the citizenship of the other parties and a summary of defendant's evidence of the amount in controversy.

4. If your notice of removal was filed more than thirty (30) days after you first received a copy of the summons and complaint, the reason removal has taken place at this time and the date you first received a paper identifying the basis for removal.

5. In actions removed on the basis of this Court's jurisdiction in which the action in state court was commenced more than one year before the date of removal, the reasons this action should not summarily be remanded to the state court.

6. The name(s) of any defendant(s) known to have been served before you filed the notice of removal who did not formally join in the notice of removal and the reasons they did not.

IT IS FURTHER ORDERED that all defendants who joined in the notice of removal may file the statement required by the foregoing jointly.

IT IS FURTHER ORDERED that counsel shall have thirty days within which to file a Joint Status Report which must:

1. Set forth the status of this action, including a list of any pending motions and/or other matters which require the attention of this Court.

2. Include a statement by counsel of action required to be taken by this Court.

3. Include as attachments copies of any pending motions, responses and replies thereto and/or any other matters requiring the Court's attention not previously attached to the Notice of Removal.

IT IS FURTHER ORDERED that the removing defendant(s) shall serve a copy of this order on all other parties to the action no later than the time they file and serve a copy of the Statement required by this order. Any party who learns at any time that any of the information provided in the Statement(s) filed pursuant to this order

contains information that is not correct shall immediately notify this Court in writing.

IT IS SO ORDERED.

The date of the Clerk's file stamp shall constitute the date of this order.

/s/ Lloyd D. George
LLOYD D. GEORGE
CHIEF U.S. DISTRICT JUDGE

/s/ Howard D. McKibben
HOWARD D. McKIBBEN
U.S. DISTRICT JUDGE

/s/ Philip M. Pro
PHILIP M. PRO
U.S. DISTRICT JUDGE

/s/ David W. Hagen
DAVID W. HAGEN
U.S. DISTRICT JUDGE

/s/ Edward C. Reed, Jr.
EDWARD C. REED, JR.
SENIOR U.S. DISTRICT JUDGE

[Certificate of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GILBERT P. HYATT, Plaintiff(s), vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, *et al.*, Defendant(s).	CV-S-98-0284-HDM(LRL) MINUTES OF THE COURT May 1, 1998

PRESENT: HONORABLE HOWARD D. McKIBBEN, CHIEF U.S. DISTRICT JUDGE

Deputy Clerk: Bette Stewart Reporter/Recorder: Kathryn M. French

Counsel for Plaintiff(s): Thomas L. Steffen and Mark A. Hutchison

Counsel for Defendant(s): Thomas R. C. Wilson, Matthew C. Addison & Jim C. Guidici

PROCEEDINGS: Telephonic Hearing on Plaintiff's Motion to Remand (#5)

2:00 p.m. Court convenes.

Arguments are made on the motion to remand by Thomas Steffen on behalf of plaintiff and by Thomas Wilson on behalf of defendant.

The court sets forth the findings of fact and conclusions of law on the record.

IT IS ORDERED that Plaintiff's Motion to Remand (#5) is *granted*. Plaintiff's motion for costs is *denied*. This

case is remanded to the Eighth Judicial District Court of the State of Nevada in and for the County of Clark.

The remaining motion, Defendant's Motion to Quash Service of Process and for No Other Relief (#12), is reserved for the state court to address.

2:35 p.m. Court adjourns.

LANCE S. WILSON, CLERK

By: /s/ [Illegible]
Deputy Clerk

ANS
THOMAS R. C. WILSON, ESQ.
Nevada Star Bar # 1568
MATTHEW C. ADDISON, ESQ.
Nevada State Bar # 4201
BRYAN R. CLARK, ESQ.
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Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive, Defendants.	Case No. : A382999 Dept. No. : X Docket No. : R ANSWER TO FIRST AMENDED COMPLAINT

COME NOW, Defendant Franchise Tax Board of the State of California ("FTB"), by and through its attorneys, McDonald Carano Wilson McCune Bergin Frankovich & Hicks, LLP, and as an Answer as follows:

ANSWER

1. FTB denies each and every allegation contained in Paragraph 1.

2. FTB admits, in general, the allegations contained in Paragraph 2.

3. FTB is without sufficient information and/or belief to admit or deny, and therefore denies, each and every allegation contained in Paragraph 3.

4. FTB denies each and every allegation contained in Paragraph 4.

5. FTB is without sufficient information and/or belief to admit or deny, and therefore denies, each and every allegation contained in Paragraph 5.

6. FTB believes Plaintiff's statements in Paragraph 6 do not constitute allegations and therefore do not require a response.

7. FTB believes Plaintiff's statements in Paragraph 7 constitute a summary of the cause of action and therefore do not require a response.

8. FTB denies Plaintiff established full-time residency in Nevada on September 28, 1991, and, with regard to the remaining allegations in Paragraph 8, FTB is without sufficient information and/or belief to admit or deny, and therefore denies, each of them.

9. FTB denies each and every allegation contained in Paragraph 9.

10. FTB admits Plaintiff filed a state income tax return with the State of California for 1991, but it denies each and every remaining allegation in Paragraph 10.

11. FTB has audited Plaintiff's tax return(s) and investigated Plaintiff's Nevada contacts, but it denies each

and every remaining allegation contained in Paragraph 11.

12. FTB denies each and every allegation in Paragraph 12.

13. FTB admits issuing requests to certain Nevada entities and people for information concerning Plaintiff without seeking permission from a Nevada court or any Nevada government agency, but it denies each and every remaining allegation in Paragraph 13.

14. FTB admits sending correspondence to certain Nevada government officials seeking information regarding Plaintiff, but it denies each and every remaining allegation contained in Paragraph 14.

15. FTB denies each and every allegation contained in Paragraph 15.

16. FTB admits the allegations contained in Paragraph 16. IRS issued formal notice.

17. FTB denies each and every allegation contained in Paragraph 17.

18. FTB is without sufficient information and/or belief to admit or deny, and therefore denies, each and every allegation contained in Paragraph 18.

19. FTB is without sufficient information and/or belief to admit or deny, and therefore denies, each and every allegation contained in Paragraph 19.

20. FTB denies each and every allegation contained in Paragraph 20.

21. FTB denies, and/or is without sufficient information and/or belief to admit or deny, and therefore denies, each and every allegation contained in Paragraph 21.

22. FTB denies each and every allegation contained in Paragraph 22.

23. FTB denies each and every allegation contained in Paragraph 23.

24. FTB denies each and every allegation contained in Paragraph 24.

25. FTB denies each and every allegation contained in Paragraph 25.

26. FTB denies each and every allegation contained in Paragraph 26.

27. FTB denies each and every allegation contained in Paragraph 27.

FIRST CAUSE OF ACTION

(For Declaratory Relief)

28. In response to Paragraph 28, FTB realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 27, as thought set forth herein.

29. FTB believes Paragraph 29 constitutes Plaintiff's counsel's view of California law, and not allegations of fact which require a response herein. To the extent, however, the statements in Paragraph 29 constitute allegations, FTB denies each and every one of them.

30. FTB denies each and every allegation contained in Paragraph 30.

31. FTB denies each and every allegation contained in Paragraph 31.

32. FTB denies each and every allegation contained in Paragraph 32.

SECOND CAUSE OF ACTION

(For Invasion of Privacy – Unreasonable Intrusion Upon the Seclusion of Another)

33. In response to Paragraph 33, FTB realleges and incorporates herein by this reference each and every allegation contained in paragraphs 1 through 32 above, as thought set forth herein.

34. FTB denies each and every allegation contained in Paragraph 34.

35. FTB denies each and every allegation contained in Paragraph 35.

36. FTB denies each and every allegation contained in Paragraph 36.

37. FTB denies each and every allegation contained in paragraph 37.

38. FTB denies each and every allegation contained in Paragraph 38.

39. FTB denies each and every allegation contained in Paragraph 39.

THIRD CAUSE OF ACTION

(For Invasion of Privacy – Unreasonable Publicity Given To Private Facts)

40. In response to Paragraph 40, FTB realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 39 above, as thought set forth herein.

41. FTB denies each and every allegation contained in Paragraph 41.

42. FTB denies each and every allegation contained in Paragraph 42.

43. FTB denies each and every allegation contained in Paragraph 43.

44. FTB denies each and every allegation contained in Paragraph 44.

FOURTH CAUSE OF ACTION

(For Invasion of Privacy – Casting Plaintiff In a False Light)

45. In response to Paragraph 45, FTB realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 44 above, as thought set forth herein.

46. FTB denies each and every allegation contained in Paragraph 46.

47. FTB denies each and every allegation contained in Paragraph 47.

48. FTB denies each and every allegation contained in Paragraph 48.

49. FTB denies each and every allegation contained in Paragraph 49.

FIFTH CAUSE OF ACTION

(For the Tort of Outrage)

50. In response to Paragraph 50, FTB realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 49 above, as thought set forth herein.

51. FTB denies each and every allegation contained in Paragraph 51.

52. FTB denies each and every allegation contained in Paragraph 52.

53. FTB denies each and every allegation contained in Paragraph 53.

SIXTH CAUSE OF ACTION

(For Abuse of Process)

54. In response to Paragraph 54, FTB realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 53 above, as thought set forth herein.

55. FTB denies each and every allegation contained in Paragraph 55.

56. FTB denies each and every allegation contained in Paragraph 56 (a), (b), (c), (d), (e), (f), (g), (h), (i), (l) and (k).

57. FTB denies each and every allegation contained in Paragraph 57.

58. FTB denies each and every allegation contained in Paragraph 58.

SEVENTH CAUSE OF ACTION

(For Fraud)

59. In response to Paragraph 59, FTB realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 58 above as thought set forth herein.

60. FTB denies and/or is without sufficient information and/or belief to admit or deny, and therefore denies, each and every allegation contained in Paragraph 60.

61. FTB denies each and every allegation contained in Paragraph 61.

62. FTB denies each and every allegation contained in Paragraph 62 (a), (b), (i), (ii), (iii), (iv), (v) and (c).

63. FTB denies each and every allegation contained in Paragraph 63 (a), (b), (c), (d), (e).

64. FTB denies each and every allegation contained in Paragraph 64.

65. FTB denies each and every allegation contained in Paragraph 65.

66. FTB denies each and every allegation contained in Paragraph 66.

67. FTB denies each and every allegation contained in Paragraph 67.

EIGHTH CAUSE OF ACTION

(For Negligent Misrepresentation)

68. In response to Paragraph 68, FTB realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 67 above, as thought set forth herein.

69. FTB denies each and every allegation contained in Paragraph 69.

70. FTB denies each and every allegation contained in Paragraph 70.

71. FTB denies each and every allegation contained in Paragraph 71.

72. FTB denies each and every allegation contained in Paragraph 72.

AFFIRMATIVE DEFENSES

1. Plaintiff's First Amended Complaint fails to state any cause of action on which relief can be granted.

2. This Court lacks the necessary jurisdiction to hear Plaintiff's causes of action for declaratory and injunctive relief.

3. Plaintiff's First Amended Complaint does not adequately set forth any claim or cause of action for punitive damages.

4. Since Plaintiff has failed to plead fraud with particularity as required under Nevada law, his Seventh Cause of Action must be dismissed.

5. The issue of Plaintiff's residency for purposes of California income tax is presently the subject of an on-going administrative procedure within the State of California. The existence of that on-going administrative procedure bars and precludes Plaintiff from litigating his allegations related to residency in this Court.

6. To the extent the negligence of any party, entity or person caused any damage to Plaintiff, FTB did not negligently act or fail to act, and any such damages were therefore caused by entities and/or persons other than FTB.

7. To the extent any damages were suffered by Plaintiff as a result of the events described in his First Amended Complaint, the majority of the cause of those damages was Plaintiff's own negligence, rather than that of FTB or unnamed defendant, so Plaintiff is barred by Nevada law from recovering any sum from any party under a negligence theory.

8. Plaintiff's Second, Third, Fourth and Fifth Causes of Action are barred by the doctrines of consort, release and waiver.

9. FTB's actions in investigating Plaintiff's income tax status were privileged and conducted without malice. In its investigation of Plaintiff and dealings with Plaintiff and his representatives, FTB was simply exercising its constitutional right to collect taxes owed to the State of California with no ulterior purpose.

10. Pursuant to the Nevada Rules of Civil Procedure, during the course of discovery in this matter, FTB may

discover additional facts and/or information which justify the alteration or supplement of these responses and affirmative defenses and therefore reserves the right to amend and/or supplement this Answer as necessary in the future.

WHEREFORE, FTB prays the Court enter judgment as follows:

1. That Plaintiff Hyatt take nothing by way of his Complaint;

2. That FTB be awarded reimbursement for the attorneys' fees and costs it has incurred and will incur in the defense of this matter; and

3. For such other and further relief as this Court deems necessary and appropriate under the circumstances of this case.

DATED this ___ day of August, 1998.

McDONALD CARANO WILSON
McCUNE BERGIN FRANKOVICH
& HICKS

By _____
MATTHEW C. ADDISON
241 Ridge St., Fourth Floor
P. O. Box 2670
Reno, Nevada 89505

[Certificate of Service Omitted In Printing]

CASE NO. 98-A382999

DISTRICT COURT

CLARK COUNTY, NEVADA

-oOo-

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA Defendant.	REPORTER'S TRANSCRIPT OF PROCEEDING

BEFORE THE DISCOVERY COMMISSIONER

THOMAS W. BIGGAR

MONDAY FEBRUARY 22, 1999

9:40 a.m.

* * *

[23] COMMISSIONER BIGGAR: The attorney-client privilege will still remain, and it has been asserted throughout the depositions. And if there are particular questions that want to be challenged at the conclusion of this deposition procedure or other, then I would look at specific questions and make specific rulings on whether or not an appropriate privilege was utilized at one time. But I would rather go into specifics, and it's extremely difficult to make some broad peremptory ruling on attorney-client privilege and before we start the deposition. Happy to do it on specific questions with specific arguments on each one.

Now, as far as the Sheila Cox deposition is going, it's a difficult matter. I understand that there's a lengthy record, and on the other hand, after reading the deposition thus far, I agree with some of the points that the plaintiffs made, I agree with some of the points the defendants have made in what's [24] causing the deposition to go as it has.

And I think that what I'm going to do is I'm going to, at this point in time, allow four more days, but I will not prevent the plaintiffs from returning to seek more. But I want to have the deposition questioning tightened up a little more. And given the fact that by now, given the number of days that have gone by since the last deposition, I'm sure Miss Cox has been boning up and will be able to answer a little more fully, and we won't have to have quite as many I don't remembers and don't recalls and will be a little more familiar with the records and be – all sides will be a little more facile in handling the records and getting the thing done.

And so I'm going to have you compress, Mr. Bourke, or whoever else is going to be doing the questioning on behalf of the plaintiff to, you know, tighten up a little bit and maybe – you know, as I read the deposition, the questioning did not go way out of bounds on these things. It did not. You know, occasionally there would be a couple of questions off the track, and we can get rid of those. Let's just stick to the key elements and go from there, and let's not be fishing quite as much even though some fishing is certainly allowed.

* * *

[26] problem, that's why I like to have the video depositions, because it's a little easier to see who is doing what if that comes up. So I will look at them in the future,

if necessary, but let's just try and get the discovery down on the merits of the case.

Mr. Hutchison.

MR. HUTCHISON: One point of clarification. Your ruling concerning related taxpayers relates to all discovery matters?

COMMISSIONER BIGGAR: Correct – I mean yes.

MR. HUTCHISON: I mean, for depositions, document requests, interrogatories.

COMMISSIONER BIGGAR: Correct.

MR. HUTCHISON: And that's all we have. Thank you, Your Honor.

MR. BOURKE: Your Honor, I wanted to make one request of the FTB through the Court, and that is for any documents filed that they not disclose Mr. Hyatt's income. If they want to file and discuss it with the Court, I would appreciate it if they put it under seal because there have been documents filed expressing Mr. Hyatt's income in 1992 and 1991, despite all these misdemeanors that they are talking about.

COMMISSIONER BIGGAR: Well, let's do this. Has there been a ruling sealing this file yet or not? [27] Was there some argument with the Court on that? I know we filed – there have been a couple of motions filed under seal and all. We have some confidentiality. I think we will have the files sealed for the Court file. And I don't know at this point in time, and for in the future I don't think there's any reason, at least in the discovery area, to

discuss specific figures on that. I mean, if discovery problems come up, I know generally what we're talking about. You know, we're not talking about $12 here that we have all these attorneys. So, Mr. Leatherwood, can you –

MR. LEATHERWOOD: Your Honor, I have no problem with that. If we inadvertently disclosed something, it was just purely because I'm over in Los Angeles and sometimes it's hard for me to file stuff here.

COMMISSIONER BIGGAR: All right. We will just do it that way, keep it under seal.

MR. HUTCHISON: Your Honor, is that an order moving forward as well, the files under seal?

COMMISSIONER BIGGAR: Yes. That means it won't be available to the public to get at the clerk's office. Counsel will be able to look at it.

MR. BRADSHAW: Okay. I can understand where in some matters either side might want to be filed [28] under seal and kept confidential, and we're willing to meet with counsel and work out a stipulated confidentiality order to cover the entire litigation, but I would like opportunity to do that before we have a blanket order sealing the entire Court file.

My concern is that when a file has to be maintained confidential and sealed, that puts a burden on the attorneys and their staffs subject to contempt of court that's not otherwise there. And I would like to have discussion with counsel about the need and scope of all that.

COMMISSIONER BIGGAR: Well, I know – believe me, I know that the whole file does not need to be under seal. I'm aware of that. I thought it would easier for

counsel if once you have the idea that it's under seal that everything will come over like that and –

MR. HUTCHISON: Right.

COMMISSIONER BIGGAR: Believe me, I'm not doing it as to bring up a hammer so that the sides can then begin saying that they didn't do, they did, they filed something, you know, and didn't note that it was under seal, and they want sanctions. That's not the purpose of this.

The purpose of it is to, you know, assure [29] some confidentiality for both sides here. Particularly the individual, I guess, but for both sides, for their benefit, and to be able to allow you to argue and put in your briefs a little more freely and not be worried about everything that you're including in a brief or something.

MR. HUTCHISON: Right.

MR. BRADSHAW: So I understand, what you're doing is sealing the Court file, you're not entering a broad order regarding confidentiality?

COMMISSIONER BIGGAR: That's right, and you gentlemen can work that out.

MR. BRADSHAW: And I might point out that in counsel's papers they criticize us for not filing one of our oppositions under seal. Although it didn't have in parentheses "filed under seal," it was filed under seal.

COMMISSIONER BIGGAR: That's why I say if you just get so you do that, then we won't have any problem.

MR. HUTCHISON: I just want to make sure clear that we're real clear here. In the future we need to file, then, matters in this case under seal.

COMMISSIONER BIGGAR: Filed under seal, that's correct. All right.

* * *

ORD
THOMAS R. C. WILSON, ESQ.
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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive Defendants.	Case No. : A382999 Dept. No. : XVIII Docket No. : F **PARTIAL JUDGMENT ON THE PLEADINGS** Date of Hearing: April 7, 1999 Time of Hearing: 10:00 a.m. (Filed April 16, 1999)

The Defendant's Motion for Judgment on the Pleadings having come before the Court on the 7th day of April, 1999, the Defendant being represented by Thomas R. C. Wilson, Esq., James W. Bradshaw, Esq., Felix Leatherwood, Esq., and George Takenouchi, Esq. and

the Plaintiff being present in court and represented by Thomas L. Steffen, Esq., John T. Steffen, Esq., Thomas K. Bourke, Esq., and Donald Kula, Esq., and the Court having considered the Defendant's Motion, the Plaintiff's Opposition, the Defendant's Reply, the Plaintiff's Surreply and the Defendant's Response to Surreply and the supporting authorities, as well as the oral arguments of counsel, and GOOD CAUSE APPEARING;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Judgment on the Pleadings is granted as to the Plaintiff's First Cause of Action for Declaratory Relief, the Court lacking subject matter jurisdiction. The Motion is denied as to the Second through Eighth causes of action.

IT IS FURTHER ORDERED that the discovery stay is lifted and that the parties may proceed with discovery to commence within a reasonable time following the April 7, 1999 hearing. The Defendant's responses to outstanding requests to admit facts and document requests served by the Plaintiff on February 22, 1999, prior to the stay of discovery, shall be served on or before April 19, 1999.

Dated this 16 day of April, 1999.

/s/ James Brennan
DISTRICT COURT JUDGE

Submitted by:
McDonald Carano Wilson
McCune Bergin Frankovich &
Hicks, LLP

/s/ Bryan Clark
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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive Defendants.	Case No. : A382999 Dept. No. : XVIII Docket No. : F Date of Hearing: April 7, 1999 Time of Hearing: 10:00 a.m.

NOTICE OF ENTRY OF ORDER

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD;

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an Order was entered in the above matter

on the 19th day of April, 1999, a copy of which is attached hereto.

DATED this 20th day of April, 1999

McDonald Carano Wilson
McCune Bergin Frankovich
& Hicks LLP

By: /s/ Bryan Clark
THOMAS R. C. WILSON, ESQ.
Nevada State Bar #1568
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[Certificate of Service Omitted In Printing]

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiff,

No. A382999

vs.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA; and DOES 1-100, inclusive,

Defendants.

_____//

Pages 1 through 250, inclusive.

VIDEOTAPED DEPOSITION OF CAROL FORD

May 4, 1999

VOLUME I

CERTIFIED COPY

REPORTED BY:

LINDA VACCAREZZA, RPR, CSR NO. 10201

* * *

[151] MR. BOURKE: Q. Is that case that you did good work on that related to the one million dollar assessment, is that a different taxpayer than the one you spent over 600 hours assessing?

A. Yes.

Q. Do you know how many hours you spent on that case with the most hours? Was it 700 hours?

[152] A. It could have been at the end, yes.

Q. Could it have been 800 hours?

A. I don't recall.

Q. Is there something at the Franchise Tax Board called the CBR or cost benefit ratio?

A. Yes.

Q. Could you tell me what that is?

A. It was a method that was used – we'll call it the olden days, that how many – let's see, somehow it was a calculation of how much tax was being generated based upon how many hours were involved in the case.

Q. Okay. And could you tell me how you learned about the CBR or cost benefit ratio?

A. It used to be discussed.

Q. When was it discussed?

A. When I was a new auditor.

Q. And did it stop being discussed at a certain time?

A. Yes. The emphasis went away from that, and I believe it had something to do with the Taxpayer Bill of Rights.

Q. Could you tell me what about the Taxpayer Bill of Rights had anything to do with the cost benefit ratio?

[153] A. I can't really tell you the answer to that.

Q. What was the cost benefit ratio that auditors were expected to live up to during the time it was discussed in the residency program?

A. I'm not – I'm trying to remember. So just a minute. It could have been like $350 per hour. But I could be very wrong on that.

Q. Could it have been $1,000 an hour?

A. I've never heard that figure.

Q. $600 an hour?

A. I don't think I've – I remember 350 and I remember 500. But I don't remember – and I don't remember specifically when that was.

Q. Were people requested to keep the CBR in other than written form? Were you discouraged from writing down the CBR?

A. I don't ever remember seeing the CBR written down.

Q. Did you ever hear the managers of the Franchise Tax Board residency program talk about a CBR goal or objective for auditors?

A. I don't think so.

Q. Do you remember Mr. Illia talking about a CBR at all?

[154] A. He could have.

Q. Was the CBR supposed to be kind of a minimum figure that you're supposed to drop an audit if it didn't

look like you were going to meet the $350 or $500 an hour objective?

A. I believe we evaluated the case at the beginning and determined how many hours we thought we were going to be devoting to the case prior to opening an examination.

Q. Does a typical residency case take about 100 hours?

A. That's our goal.

Q. The goal is to make a residency case complete by the end of 100 hours?

A. Yes.

Q. Do you know whether or not the residency program has ever had a taxpayer with as large a tax assessment as Gil Hyatt?

A. I don't have access to that knowledge. I don't know.

Q. You're not aware of any as large as his?

A. No.

MR. WILSON: Well, I have to object. Did you understand the question?

THE WITNESS: Not for sure.

* * *

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT H. HYATT, Plaintiff, -vs- FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and Does 1 - 100, Inclusive, Defendants.	)	CASE NO. A382999 Dept. No. XVIII

Examination of DARLENE BEER, taken at 300 South Spring Street, Sixth Floor, Los Angeles, California, commencing at 1:35 p.m., Thursday, August 26, 1999, before Gail E. Ferguson, CSR No. 7742.

* * *

[5] EXAMINATION

BY MR. TAKENOUCHI:

Q Good afternoon, Ms. Beer, Thank you for coming to my office at the request of Mr. Dameron. The purpose of this meeting is to permit you to make a record and for us to record your statement that you previously provided Mr. Dameron concerning certain matters.

When the interview is completed the court reporter will prepare a transcript of this meeting. Mr. Dameron will then transport that statement for you to review and acknowledge the accuracy of your statement.

I will store the statement for your protection in the future. Although this is an informal interview, you are not giving a statement under penalty of perjury, we are asking you to provide an honest and complete statement. So can you do that for us?

A Yes.

Q Please state your name for the report?

A Darlene Beer

Q Do you have a middle name?

A Louise

Q Okay. Where do you currently live?

A 642 East Culver, Orange, California.

Q And how long have you lived there?

A 52 years.

[6] Q Are you currently employed?

A Sort of.

Q Part time?

A Yeah. A couple hours a week I'm a secretary for a Mexican restaurant.

Q Who do you live with?

A My husband. And you don't want to know the rest of them. My daughter and two grandsons.

Q At any time did you receive a commission to be a notary public?

A Yes.

Q Can you tell us the facts and circumstances about when you received the commission to become a notary?

A I worked in a bank and they liked to have a notary there and they asked me to be one.

Q How long have you been a notary?

A A real long time. I worked at Sanwa for 33 years and I was a notary there probably in the '80s that I first got my commission.

Q Based on the Secretary of State's information we were informed that your last commission was effective from December 6, 1991 to December 5, 1995; is that true?

A That's true.

Q. What do you recall about your notary commission during this period?

[7] **Let me ask you this: were you working at Capital Bank located at 4875 La Palma Avenue, La Palma, California at the time of this notary commission?**

A Yes, and it's for customer service.

Q Did you inform our investigator, Mr. Dameron, that you were employed by Capital Bank from September 1991 through September 1993?

A Yes.

Q Is it your understanding that Capital Bank was closed approximately one year after you left?

A Yes.

Q I'll show you a copy of a document that we'll mark as Exhibit 1.

(Exhibit 1 was marked for identification.)

MR. TAKENOUCHI: Q Now, does this document, this Exhibit 1 bear the number in the upper right-hand corner DOC #93-0404104?

A Yes.

Q Did Mr. Dameron previously show you this document?

A Yes

Q Does this document bear your signature and notary stamp?

A Yes.

Q Where did you sign this document? When did you [9] **sign this document, excuse me?**

A When did I sign it?

Q When did you sign the document, can you recall?

A June of '93.

Q I'll direct you to the bottom half of the page where it says October 1, 1991. Does this state in part that, "on October 1, 1991 before me, Darlene Beer, personally appeared Gilbert P. Hyatt personally

known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity by his signature on the instrument the person or the entity upon behalf of which the person acted, executed the instrument," is that right?

A Yes.

Q. Did Mr. Hyatt come before you on October 1, 1991?

A No.

Q Did Mr. Hyatt sign this document in your presence on October 1, 1991?

A No.

Q Did you witness Mr. Hyatt sign this document on October 1, 1991?

A No.

Q Did you sign this document on October 1, 1991?

A No.

[9] **Q I'll hand you a copy of a document which is to be marked Exhibit 2.**

(Exhibit 2 was marked for identification.)

MR. TAKENOUCHI: Q Does this document, Exhibit 2, bear the document number 93-0404104 in the upper right-hand corner?

A Yes.

Q Did Mr. Dameron previously show you this document?

A Yes.

Q Does this document bear your signature and notary stamp?

A Yes.

Q When did you sign this document?

A June 1993.

Q I direct your attention to the bottom half of the page where it states October 1, 1991. Do you see that?

A Yes.

Q Does this state in part that, "On October 1, 1991 before me, the undersigned, a notary public in and for said county and state personally appeared Grace Jeng, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledge to me that she executed the same." Do you see that on the bottom of the page?

* * *

[14] **In this document you acknowledged Ms. Jeng's signature on June 10, 1993, is that true?**

A Yes.

Q Did you, in fact, notarize the document on June 10, 1993?

A Yes.

Q Did Ms. Jeng sign Exhibit 2 in your presence on June 10, 1993?

A Yes.

Q Directing your attention to page 18, column six, does this state "Identification of Signer?"

A Yes.

Q And this is Exhibit 3?

A Yes.

Q Looking down at page 18, row four, column six, of Exhibit 3?

A Yes.

Q Column six states, "Identification of Signer." Looking down the page to row four, column six, it is marked CDL CO 317886, dob 8/31/47; is that correction?

A Yes.

Q Is that in your handwriting?

A Yes.

Q What does that notification mean?

A That's their identification, it's a California [15] driver's license number CO31786, and dob is date of birth 8/31/47.

Q Looking across row four to column seven, what information is contained in those two boxes?

A The address of the person that signed the book,.

Q And column eight?

A Is the fee that's charged, the notary fee.

Q Looking across row four, column nine, there is a notation, "doc dated. 10/1/91."

A 10/1, that's correct.

Q Does it state that at the top of the page on column nine that's "Additional Pertinent Information?"

A Yes.

Q Okay. On row four, column nine, there's a notation that states, "10/1/91 w/Mr. Hyatt."

A Yes.

Q What does that mean?

A That means the document was dated 10/1 of '91 and Grace Jeng came in with Mr. Hyatt.

Q Did Mr. Hyatt appear in your place of business with a person who identified herself as being Grace Jeng on June 10, 1993?

A Yes.

Q In the presence of Mr. Hyatt were you requested to acknowledge the signature of Grace Jeng on a Short Form [16] **Deed of Trust?**

A Yes

Q In the presence of Mr. Hyatt did you indicate that Grace Jeng's signature was acknowledged before you on October 1, 1991?

A Repeat that please?

Q In the presence of Mr. Hyatt did you indicate that Grace Jeng's signature was acknowledged before you on October 1, 1991?

A No.

Q Did you indicate the document in your notary log that the Short Form Deed of Trust was dated October 1, 1991?

A Yes.

Q Directing you to box marked five on page 17.

A Yes.

Q Does this box marked five consist of 10 columns that run across page 17 to and through page 18 and end with another box marked five?

A Yes.

Q Reading from the left does the first column on the top of page 17 state "Act:Mo/Day/Yr/Time?"

A Yes.

Q Going to the row or box marked five and going over the first column to the left does it say, "6/10/93?"

[17] A Yes.

Q Did you write that on page 17?

A Yes.

Q Does this mean June 10, 1993?

A Yes.

Q Based on this notation what happened on June 10, 1993?

A I acknowledged a signature.

Q Going to the top of the page to column two marked "Act:Kind or Type," do you find that?

A Yes.

Q What does this mean?

A Acknowledgment, I acknowledged a signature.

Q Did you write acknowledgment in that box?

A I wrote that.

Q Okay. Did you write that on page 17?

A Yes.

Q Okay. Did you write that on June 10, 1993?

A Yes.

Q Based on this notation what happened on June 10, 1993?

A I notarized a signature of 6/10/93.

Q Directing your attention to the top of page 17, column three, do you see "Document: Mo/Day/Yr," do you see that?

* * *

[22] **Q Did Mr. Hyatt sign Exhibit 7 in your presence on September 4, 1992?**

A Yes.

Q Okay. Let me show you another exhibit, these pages consist of Exhibit 4.

(Exhibit 4 was marked for identification.)

MR. TAKENOUCHI: Q Can you please look at Exhibit 4 which consists of four pages. Do you recognize this person to be Gilbert Hyatt?

A No

Q Before June 10, 1993 did you know Mr. Hyatt?

A Yes.

Q Do you know who Mr. Hyatt is? Do you know who Mr. Hyatt is?

A No.

Q Do you know Ms. Jeng's relationship with Mr. Hyatt?

A No.

Q Did Mr. Hyatt sign your notary log document in your presence?

A Yes.

Q When you acknowledged his signature?

A Yes.

Q Could you please look at Exhibit 1 again?

A Yes.

Q Is this a document that Mr. Hyatt requested you [23] to acknowledge his signature on June 10, 1993?

A Yes.

Q Did you, in fact, notarize this document on June 10, 1991?

A Yes.

Q Directing your attention to Exhibit 3, page 18, and that's Exhibit 3, page 18, column six, does it state "Identification of Signer?"

A Yes.

Q If you look down to row five, column six, it's marked "N-e-v L-i-c R 253 810."

A Yes.

Q Is that in your handwriting?

A Yes.

Q What does this notation mean?

A Nevada license number R 253810.

Q Look at that notation in the same box, 473861999938. Did you make this notation?

A Yes.

Q What does this notation mean?

A I don't remember.

Q Looking across to row five, column seven.

A Yes.

Q What information is contained in that box?

A Mr. Hyatt's address.

[24] **Q Who entered that information?**

A He did.

Q That's in his handwriting?

A It's in his handwriting.

Q Looking across row five to column nine there's a notation, "doc dated 10/1/91, customer known to DB. Customer has safe dep. boxes."

A Right.

Q What does this mean?

A The document was dated 10/1 of '91 and the customer was known to Darlene Beer. Customer has safety deposit boxes at the bank.

Q Did Mr. Hyatt appear in your place of business with a person who identified herself as being Grace Jeng on June 10, 1993?

A Yes.

Q In the presence of Ms. Jeng were you requested to acknowledge the signature of Gilbert Hyatt on a Grant Deed?

A Yes.

Q In the presence of Ms. Jeng did you acknowledge the signature of Gilbert Hyatt before you on October 1, 1991?

A Please repeat?

Q In the presence of Ms. Jeng did you indicate [25] that Gilbert Hyatt acknowledged his signature before you on October 1, 1991?

A No.

Q Did you in fact document in your notary log that the Grant Deed was dated October 1, 1991?

A Yes.

Q I'll hand you a set of documents that I'll mark as Exhibit 9.

(Exhibit 9 was marked for identification.)

MR. TAKENOUCHI: Q This is a copy of your notary logbook.

A Yes.

Q Is this a true copy of your notary logbook that you surrendered to a representative of the Department of Justice and the Attorney General?

A Yes.

Q Have you had a chance to compare this with the original?

A Yes.

Q I will hand you another document that will be marked as exhibit 10.

(Exhibit 10 was marked for identification.)

MR. TAKENOUCHI: Q Exhibit 10 is another copy of your notary logbook. Have you had a chance to compare Exhibit 10 with the original notary logbook?

* * *

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Defendant.	)	Case No. 98-A-382999-C

BEFORE DISCOVERY COMMISSIONER
THOMAS W. BIGGAR

Taken as the Discovery Commission
200 South Third Street, Fourth Floor
Las Vegas, Nevada

On Tuesday, November 9, 1999
at 10:07 a.m.

Reported by: Margie L. Carlson
CCR No. 287

* * *

[53] think the deliberative privilege has been completely distorted as a result of any realization of what it was, particularly in a case where the process of the audit is itself at issue in the case.

MR. LEATHERWOOD: And that's where the rubber really does meet the road, and that's where I have a fundamental difference with the Court, not only with the discovery commissioner but the trial court here, that in the state of California in order to probe to find out what

were the audit findings, audit criteria, those kinds of disclosure you are precluded under California law.

The focus of our arguments there, at least as my understanding of the deliberative process was really an umbrella objection saying that the executive of the state of California has an inherent right to raise and collect these taxes and investigate individuals who are in some way not paying their taxes.

Now, we have a substantial, a wealth of evidence to show that Mr. Hyatt not only evaded his taxes but fraudulently evaded his taxes, and whether or not we have to come to Nevada to collect it, that's one issue, but for a Nevada court to authorize proceedings in which every administrative [54] officer is asked point by point questions as to why did they engage in certain behavior is really intruding into the entire thought processes. It's because for one thing how can they freely think about the entire process and examine a particular taxpayer, particularly when it's one that is determined not to pay his taxes as Mr. Hyatt.

COMMISSIONER BIGGAR: Let me ask you this, Mr. Leatherwood. If a tax examiner says, for instance, in a hypothetical case, we don't think we have a very good case, but let's tack on a fraud penalty and that will make the taxpayer settle, is that something that should be examined?

MR. LEATHERWOOD: Your Honor, and if that was the case that taxpayer – that tax auditor would be subject to significant, significant liability not only with this agency but maybe in other legal matters. However, there is an entire process here that is available to Mr. Hyatt rather than having the state of Nevada determine

whether or not a particular process makes sense or not. There is a long, entire process that Mr. Hyatt has done his best to undermine and preclude us to proceed, including this confidential –

COMMISSIONER BIGGAR: Protective order.

[55] MR. LEATHERWOOD: – protective order, which he has presented a protective order which he has not shown one single instance why this Court should have a heightened concern for confidentiality as opposed to any other taxpayer in this country or that may be involved in a legal proceeding.

All he has done is he has walked in here and said he has these concerns, when we in fact we know Mr. Hyatt has concocted a scheme in which to evade the enforcement of taxes, what he has done he has raised the state of Nevada to preclude that tax from being enforced. Now, they have, Mr. Hyatt has examined the auditor for nine days, has reviewed this file, and they have not come up with one instance in which someone said, "We are going to lay on this tax even though, even though Mr. Hyatt doesn't deserve this tax." That has not even been –

COMMISSIONER BIGGAR: You are saying there is nothing like that in the file?

MR. LEATHERWOOD: I haven't seen it. I have not seen any evidence of that nature.

COMMISSIONER BIGGAR: Well, I am kind of confused on why the file shouldn't be an open book, Mr. Leatherwood. If there is nothing to conceal why [56] shouldn't the process be open to the taxpayer when they are claiming that there is fraud. You are claiming that he is defrauding you. He is claiming that your conduct is

fraudulent. I say yours, the FTB's conduct is fraudulent. I can't say I completely agree with you that all of the taxpayer's machinations here, however they are done, should be completely explored, and you are certainly entitled to do that.

I am concerned, and I think there is concern countrywide about the tax collecting services using methods that are not appropriate and, you know, we all are completely aware of that in regard to the IRS and methods like that, and I think that these processes should be explored in the proper context.

You indicate that Mr. Hyatt has all of his rights and remedies in California to challenge the tax. I don't know if those rights and remedies include exploration of the process and availability to all the information that he could get by way of the claims that the Court has left intact here. If there is fraud to be discovered, I think it should be discovered on one side or the other.

MR. LEATHERWOOD: So then why don't you [57] let us discover their fraud? How come you have crippled us with a protective order?

COMMISSIONER BIGGAR: I don't believe I have crippled you, Mr. Leatherwood. I just today upon your motion granted your entire motion to compel subject to the protective order which certainly does not preclude you from getting all the information that you have requested, and in fact you will get it. It's a question of disbursement. That has nothing to do with your inability to obtain the information. However, the argument here is you don't want to give them the information at all.

MR. LEATHERWOOD: No, in fact we have provided them with, on four separate occasions. What the process is going on here is what is the thinking process, what is the evidence of the thinking process of the people that were involved in the assessment process even as it is continuing on now.

COMMISSIONER BIGGAR: But you never answered my original hypothetical question about if there were attempts to obtain taxes in some kind of fraudulent fashion as I believe would be the case if the attempt would have been made to say, you know, if you don't pay we are going to assess a fraud [58] penalty on you, even though there is no fraud that we can determine legally, we are going to assess that fraud penalty on you if you don't settle with us. Now, in my view that would be an improper way of collecting taxes, but I think that you should be able to explore and find out whether or not that in fact happened. If it did or if it did not happen.

MR. LEATHERWOOD: In the middle of the process itself, in other words, Mr. Hyatt can circumvent entirely a laid-out administrative process including remedies available in California courts to have a Nevada court come in and supervise the administration of California tax law?

COMMISSIONER BIGGAR: Well, because the way Nevada got involved in this way by acts done by the FTB in Nevada. Nobody disputes that certain acts were done in Nevada in the process of collecting this tax, or let's not say collecting. Nothing has been collected yet I guess, in assessing the tax, and that's what, that's why you are here. That's why you are here.

MR. LEATHERWOOD: There is no doubt about it.

COMMISSIONER BIGGAR: Believe me I wish [59] you weren't here.

MR. LEATHERWOOD: But, but, not to cut it off, to answer your question quite frankly, everyone knows in my office I am more of a taxpayer advocate than any other attorney around here. I take the harder cases. I take the tougher cases, but generally I'm the one, if I see there is some merit in a taxpayer's claim, the taxpayer will generally get a break, and if I as an auditor, if I had violated a taxpayer's rights and there were remedies available in the law, then I would encourage the taxpayer to take these remedies, but in this particular case I know for a fact that Mr. Hyatt has crafted, has concocted a scheme by which to avoid payment of the California taxes.

Now, whether or not –

COMMISSIONER BIGGAR: I'm not sure however, Mr. Leatherwood, that in the zeal to collect taxes which the state of California is positive they are entitled to, and I don't think that's too strenuous of a word to use. I think that all the investigation here that has been conducted has led a number of people in the tax collecting process to be as competent as you are and as warm to the subject as you are, that taxes are owed, that [60] that thereby justifies procedures that may not be strictly within the rules to collect those taxes.

MR. LEATHERWOOD: That didn't occur here.

COMMISSIONER BIGGAR: Well, then I think we need to find out what was done exactly and then let the jury or the judge decide if that occurred or not.

MR. LEATHERWOOD: Well, they have taken 20-something depositions. They haven't found anything yet, and now –

COMMISSIONER BIGGAR: Perhaps it's in these documents you don't want to turn over.

MR. LEATHERWOOD: Well, you have had a chance to review those documents.

COMMISSIONER BIGGAR: I don't think you want my opinion on it, Mr. Leatherwood.

I am concerned. We got off the track here with the deliberative process, and I guess what I can say is I don't agree with the defendants as far as the deliberative privilege being invoked here, and I also take into consideration all of the arguments made by the plaintiff concerning whether or not there even is a deliberative privilege given the newer California law and freedom of information and what information should be available.

[61] I also disagree with the defendants in their assertion or their definition of the audit file itself and what is and can be encompassed in that. I think that the audit file, anybody's reasonable interpretation of it would be all of the information gathered during the audit process that had to do with the imposition of the proposed tax on Mr. Hyatt in this particular case.

So I find that Anna Jovanovich is – you know, I'm not sure how to characterize her except as she is a critical witness in the case. She has played a major role in the handling of the audit both in advice and, well, I guess an advisory capacity and then in a capacity which I find, in disagreeing with Mr. Bradshaw's argument, that she is in effect reviewing her own findings as a protest officer on

the legitimacy – or legitimacy is not the right word but at least the regularity and the accuracy of the initial audit which she was also heavily involved in.

I am concerned and I guess I need to have a little bit more say on this part on the Jovanovich deposition. After reading comments from her in her deposition I am still completely amazed at why she was not produced immediately for deposition and what [62] the FTB's, the FTB's assertion that they didn't know how to get ahold of her was I think grounds for sanctions in this particular case, if nothing else has been, and particularly with the continued involvement that she had after she left the office, her retention as a consultant in this case, and then to have counsel for the FTB come in and say, "We don't know how to get ahold of her. She is under a witness protection type of program," and then that same person, Jovanovich, you know, now we are claiming that attorney-client information.

MR. LEATHERWOOD: Your Honor –

COMMISSIONER BIGGAR: Mr. Leatherwood, you are the one who made the representation that she wasn't available and that will –

MR. LEATHERWOOD: I know for a fact that there was no, there was no way I could get ahold of Miss Jovanovich.

COMMISSIONER BIGGAR: How did you get ahold of her to act as a consultant?

MR. LEATHERWOOD: As I represented to the Court before, I contacted Terry Collins.

COMMISSIONER BIGGAR: Why couldn't you contact him this time?

MR. LEATHERWOOD: I did contact Terry [63] Collins. No one knew how to get ahold of Anna Jovanovich.

COMMISSIONER BIGGAR: So after she provided you with those lengthy memos then she disappeared?

MR. LEATHERWOOD: This is more than a year and a half later, Your Honor.

COMMISSIONER BIGGAR: What was more than a year and a half later?

MR. LEATHERWOOD: When plaintiff attempted to take the deposition of Miss Jovanovich was more than a year and a half after I had my last communication with her. I think when Mr. Bourke took the deposition of Anna Jovanovich she asked me when was the last time she spoke to me. She said a year and a half ago. Mr. Bourke asked Anna Jovanovich when, what was the last time Mr. Leatherwood got ahold of her, and she said, "It's impossible for Mr. Leatherwood to get ahold of me." It was impossible for me to know how to get ahold of her or to get ahold of her.

COMMISSIONER BIGGAR: There was no witness protection like their –

MR. LEATHERWOOD: I did not make that representation to this Court, but I'm not going to [64] back off the representation. What, literally how that occurred is that it was the musing of two attorneys where we were talking about where was Anna Jovanovich, and I represented, I said, "I don't know. She is under some kind of

close scrutiny. They are concerned about her exposure to various taxpayers and she is into some kind of protection."

I later understood that representation was made in court of a witness protection program. Now, when I first heard about it, the representation that I made to the Court was simply that there is no such thing as a witness protection program. However, I have never gone into the details or the contours of my conversation with Anna Jovanovich or any attorneys who are employed by the attorney general's office in this matter because that's a matter of our own communication.

COMMISSIONER BIGGAR: I thought she had testified Mr. Collins had her number.

MR. LEATHERWOOD: Mr. Collins had a number on which he could leave a message and Mr. Collins did leave a message for her, and what occurred, she told us not to give out her telephone number or her address, and it was my understanding that the FTB is duty bound by California law not to [65] disclose retired persons' personal information including their address.

COMMISSIONER BIGGAR: Let me ask you this, Mr. Kula, if you want to address this, you indicated in your brief that Miss Jovanovich testified about advice that she gave to the auditors and stuff. Am I right in that, or am I making the wrong –

MR. KULA: Advice she gave the auditors?

COMMISSIONER BIGGAR: Right.

MR. KULA: She certainly had discussions on the privilege.

COMMISSIONER BIGGAR: No, I meant that she testified about things she told the auditors and so forth in her deposition thus far, or Mr. Bourke.

MR. BOURKE: Yes, Your Honor, I don't think she went into great detail about it though. She did testify she was asked questions and she answered them.

COMMISSIONER BIGGAR: No, that's not what I meant. Did she testify about anything she told the auditor?

MR. BOURKE: Yes, she was asked questions about the audit and she answered the questions, but she didn't recall the specifics about what she told.

[66] COMMISSIONER BIGGAR: I'm a little confused. You asked her questions.

MR. BOURKE: I asked her questions.

COMMISSIONER BIGGAR: And she testified about advice she gave to the auditors; is that right?

MR. BOURKE: Yes.

COMMISSIONER BIGGAR: But she didn't recall –

MR. BOURKE: The details.

COMMISSIONER BIGGAR: – the details, and she had not reviewed any documents in preparation for her testimony, or do you remember what that –

MR. BOURKE: I don't remember what she reviewed.

COMMISSIONER BIGGAR: Well, she did say she had reviewed documents?

MR. BOURKE: I don't remember one way or the other.

Oh, yes, Your Honor, one thing she did testify that she reviewed was the handwritten notes of her conversation with Eugene Cowan, and she did use those to refresh her memory, and those were produced.

COMMISSIONER BIGGAR: She said she had [67] reviewed notes of conversations with Mr. Cowan?

MR. BOURKE: Yes.

COMMISSIONER BIGGAR: Well, let me ask you this, do you have the same – you or Mr. Kula can answer this. How about Mr. Gould, do you think he acted in any kind of different capacity in giving advice that Miss Jovanovich did?

MR. BOURKE: No, Your Honor, I think he and Miss Jovanovich worked behind the scenes as a team. Miss Jovanovich I would say had two or three times as much contact with the auditors as Mr. Gould. For example, the very first time that the auditors went to the legal department was in October of 1993 when they sent the progress notes they sent the entire file up to Miss Jovanovich and Mr. Gould.

COMMISSIONER BIGGAR: That was Mr. Shayer?

MR. BOURKE: Mr. Shayer sent it to Anna Jovanovich, and the person returning the message to Anna was Mr. Gould, and that's why the privilege log then

reflects a privileged communication from Mr. Gould to Mr. Shayer, but the original memo was directed to Anna Jovanovich, and since I took her deposition I wanted to tell you I learned through [68] hard experience how to pronounce her name. Everyone is saying Jovanovich. She says it's like a Y-o, Jovanovich.

COMMISSIONER BIGGAR: All right, thank you.

MR. KULA: Your Honor, one thing I'll just ask in regard to this issue of Miss Jovanovich and Mr. Gould, I do have copies of these three cases I want you to have, and I can give copies to the Court and copies to the opposing counsel.

COMMISSIONER BIGGAR: One of the troubles I have in this case and the reason I'm so slow on making some rulings in this case is because I get a lot of information, particularly from plaintiff's side, and whereas in the supreme court as my last recollection of the supreme court of the state of Nevada, the maximum length of a brief you can even submit is 30 pages, and I think that's usually fairly important issues when it gets to that point, but here anytime there is a motion made I get at least 50 pages of briefing material and at least – well, you know, binders full of exhibits and case law.

MR. KULA: I can simply submit the most relevant case I mentioned, Texico Puerto Rico.

[69] COMMISSIONER BIGGAR: I will look at that case as well.

Well, Mr. Leatherwood, did you have anything to add on that point?

MR. LEATHERWOOD: No, because I haven't seen the cases and I haven't seen the supplemental brief, but I do have something to add on the point on this Anna Jovanovich and Gould matter.

At some point in time the Court's going to have to determine whether or not the FTB legal staff, our lawyers, have privileges and the rights of an attorney representing their clients or not, and this is one of those situations. Mr. Gould's memos have been available for the auditors so he was acting as a lawyer for his department, and just, if I could just drift for one minute back to Jovanovich and the deposition, I would like to remind the Court that finally after we were able to convince Anna Jovanovich to come to California, the board and the attorney general's office paid her to come. We sent her up in Sacramento. We experienced a significant amount of our own personal costs to bring her in here, but it was very difficult for us.

COMMISSIONER BIGGAR: Do you classify her as an expert?

[70] MR. LEATHERWOOD: Pardon me?

COMMISSIONER BIGGAR: Is she an expert?

MR. LEATHERWOOD: She is a retired person, and she just couldn't afford to come over here for a deposition.

MR. KULA: The alternative was to give us her address.

MR. LEATHERWOOD: Well, once again we were challenged by the California law which precluded us from disclosing that.

COMMISSIONER BIGGAR: As far as the initial documents are concerned, I think that in this particular case there's going to be error on some side, that the Nevada Rules of Civil Procedure have the broader the discovery, the more appropriate, and I think that that is the, that should be the point of this particular case, that the discovery should be broad. Given the Court's failure to limit the issues in this case any more than the Court did, and the Court said that discovery would be – or, I mean, the Court didn't say anything about discovery, that the plaintiff was entitled to press the case in all of the counts alleged in the complaint, and in this regard I think the heart of the case is the process by which the [71] FTB conducted this audit, including but not limited to those parts of the audit which intruded into the state of Nevada.

MR. LEATHERWOOD: So if I understand the Court correctly, that activities that were exclusively performed within the state of California this Court feels it has jurisdiction over?

COMMISSIONER BIGGAR: Because it's directed at the plaintiff who I think it's unquestioned was a resident of the state of Nevada on the date on, as I understand and perhaps there is a disagreement on that, but I believe that even the state of California would stipulate and/or admit that as of sometime in 1992 that Mr. Hyatt became a resident of the state of Nevada.

MR. LEATHERWOOD: We now have evidence that Mr. Hyatt was residing at his address in 1992.

COMMISSIONER BIGGAR: And all of the auditing and all of the processing that took place in this whole case arose, what, '94, '95?

MR. KULA: '93, '94.

COMMISSIONER BIGGAR: '95, so in addition to that I find that the Court did not limit it just to acts taking place in Nevada, so in my view unless the Court were to change that, I guess you are right [72] in your assumption.

MR. LEATHERWOOD: Your Honor, I just want to make sure that the Court understands. I'm not trying to be antagonistic or confrontational. What I'm just trying to do is draw out the Court's thinking, okay?

COMMISSIONER BIGGAR: You got it.

MR. LEATHERWOOD: So you really have a record in which we can have –

COMMISSIONER BIGGAR: Appeal? Oh, no, I wouldn't do that.

MR. LEATHERWOOD: I'm not saying – what I'm saying –

COMMISSIONER BIGGAR: No, I have no problem, Mr. Leatherwood with that. You are entitled to know what I am thinking, and I want to let you know what I am thinking. I am trying not to just guess at the answers, but I'm trying to at least give us a basis, reasonable or otherwise.

MR. BRADSHAW: I do recall this was briefed, and Judge Saitta did tell the parties at our oral argument on the motion for judgment on the pleadings that by dismissing the first cause of action, which was basically the tax case, that that should make a difference in the

scope of discovery [73] and it seems what we are getting into is the breadth and detail of the tax administration.

COMMISSIONER BIGGAR: See, and I don't agree with that, Mr. Bradshaw. At least the way I read it is that I think the Court was not going to make a determination on what the tax was owed or whether it was imposed or proposed properly. The Court was not going to interfere with California in that regard, and which would obviously make a severe limitation on discovery.

I think that was clearly correct, you know, that problem about collecting tax that is imposed ultimately if then there was, you know, that would have to be hashed out in California and/or in Nevada in some later case if there is some judgment outstanding or something to that effect, but the process I think is still fair game, and if you think otherwise you will have to have the judge say that because obviously in my view if we are only concerned with acts that took place in the state of Nevada, then we would have a very small range of discovery in this case because I think everybody is in agreement there were only some few certain acts done in Nevada, investigation by the FTB on premises, so to speak, here as well as inquiring [74] with various Nevada companies and other things, but that in my view is only a part of the process of collecting the tax from Mr. Hyatt, and the process is what is under attack here, and I think in my view, particularly a state agency should feel that its processes should be open to exploration in a case such as this so that we have an open form of government.

In any event the ruling is going to be thusly, that I'm going to have the – that I don't find on any of the documents thus far to be a reasonable assertion of the deliberative

privilege, and the case law is clear to me that the deliberative privilege applies at higher levels at policy-making and decision-making levels that are not involved in this particular case.

Deliberative process, deliberative privilege, if it were to be available here, and I believe you can argue that it would be available, that it could be available here under Nevada law and/or case law, common law, that would not be hinged upon by California statutory law even if it were available here, this is not the situation that the deliberative privilege addresses.

This is more the administrative process

* * *

ORIGINAL

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DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff, v. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive, Defendants.	) Case No. A382999) Dept. No. XVIII) Docket F) **DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATION**) Filed Under Seal Pursuant to the Discovery Commissioner's Ruling of February 22, 1999

Date of Conference: November 9, 1999

Time of Conference: 10:00 a.m.

NATURE OF ACTION

(Filed Dec. 27, 1999)

On November 9, 1999, the Court heard additional argument in regard to Plaintiff Gil Hyatt's motion to compel re missing, redacted, and sanitized documents from FTB's Residency Audit Files of Hyatt and Hyatt's Motion for an order compelling production of witness Anna Jovanovich for deposition testimony or her current address.

[I have reviewed Defendant's proposed changes to this recommendation, submitted in the letter of 11/28/99, but find said charges to be unnecessary to their recommendations.]

APPEARANCES

At the November 9, 1999 hearing, Mark A. Hutchison, Thomas K. Bourke, and Donald J. Kula appeared on behalf of the Plaintiff, Gil Hyatt, and James A. Bradshaw, Thomas R. C. Wilson, Matthew C. Addison, and Felix E. Leatherwood appeared on behalf of the Defendant, the Franchise Tax Board of California, *i.e.* the FTB.

FINDINGS

1. The Court previously held hearings on April 20, 1999 and May 5, 1999 in regard to Hyatt's motion to compel re missing, redacted, and sanitized documents from FTB's Residency Audit Files of Hyatt and Hyatt's motion for an order compelling production of witness Anna Jovanovich for deposition testimony or her current address. A Discovery Commissioner's Report and Recommendation for each of the prior hearings was signed by the

Discovery Commissioner on or about April 30, 1999 and October 26, 1999, respectively.

2. At the May 5, 1999 hearing, after listening to the oral arguments of counsel, the Court ordered post-hearing briefing in regard to certain documents the Court had reviewed *in-camera*. *See* Commissioner's Report and Recommendation of October 26, 1999, ¶ 8 for identification of the specific documents. In addition, the Court ordered that the FTB provide a privilege log to Hyatt by May 21, 1999, of all Hyatt-specific documents to which the FTB was objecting and refusing to produce to Hyatt based on privilege. The Court also ordered that the parties' respective post-hearing briefs address any new documents included on the FTB's privilege log not previously addressed by the parties or the Court.

3. On May 26, 1999, the FTB submitted a "First Supplemental" privilege log listing 29 Hyatt-specific documents to which it was objecting and refusing to produce based on asserted privileges. Hyatt submitted post-Hearing Memorandum of Points and Authorities and additional supporting papers on June 1, 1999, addressing the issues raised by the Court during the May 5, 1999 hearing as well as the new documents listed on the FTB's May 26, 1999 "First Supplemental" privilege log. In response, the FTB submitted its Post-Hearing Memorandum of Points and Authorities and additional supporting papers on June 26, 1999. Hyatt then submitted a Post-Hearing Reply and supporting papers on July 19, 1999.

4. At the November 9, 1999 hearing, the Discovery Commissioner found that the entire process of the FTB audits of Hyatt, including the FTB assessments of taxes and the protests, is at issue in this case and a proper

subject of discovery based on Judge Saitta's ruling on the FTB's Motion for Judgment on the Pleadings leaving intact all of Hyatt's tort claims. Specifically, Hyatt is alleging fraud, among other torts, by the FTB in the manner it audited him and assessed and attempted to collect taxes and penalties from him. Hyatt's claim of fraud against the FTB entitles him to discovery on the entire audit and assessment process performed by the FTB that was and is directed at him as part of the FTB's attempt to collect taxes from Hyatt.

5. At the November 9, 1999 hearing, the Discovery Commissioner found that the FTB's assertions of the deliberative-process privilege as to documents listed on the FTB's May 26, 1999 "First Supplemental" privilege log as to the FTB's assertions of such privilege during depositions in the examples provided to the Court were improper and overruled in their entirety. In making this finding, the Discovery Commissioner determined that the FTB's attempt to assert the deliberative-process privilege in this case is a distortion of the privilege, in particular because the process of the FTB audits directed at Hyatt is squarely at issue in this case. In making this finding, the Discovery Commissioner also took into consideration all arguments made by Hyatt in opposing the FTB's assertion of the deliberative-process privilege including, but not limited to, the fact that the privilege applies only to higher-level policy decisions.

6. At the November 9, 1999 hearing, the Discovery Commissioner found that the attorney-client privilege does not apply to Anna Jovanovich's work, communications, information, or documents generated or received in regard to the Hyatt audits, assessments by the FTB, and the subsequent protest proceedings for the period of time

Jovanovich was still in the employment of the FTB. This finding is based upon Ms. Jovanovich's participation throughout the FTB's audits, assessments, and protests relating to Mr. Hyatt in which Ms. Jovanovich was an integral part of the audit process, not just an attorney providing occasional legal advice on specific questions of law.

7. At the November 9, 1999 hearing, the Discovery Commissioner found that a significant showing is necessary to conclude that a crime or fraud has been committed sufficient to invoke the crime/fraud exception and find waiver of the attorney-client privilege. Hyatt's assertion of the crime/fraud exception is not frivolous in this case, but the Discovery Commissioner will not order at this time production of materials claimed to be privileged based on the crime/fraud exception.

8. At the hearing conducted on November 9, 1999, the Discovery Commissioner made findings based upon the arguments of counsel in regard to the documents submitted for *in-camera* review and the new documents listed on the FTB's May 26, 1999 "First Supplemental" privilege log. The specific findings for these documents are set forth below in the Recommendations with reference to each document number.

RECOMMENDATIONS

9. The Discovery Commissioner makes the following recommendations as to the documents listed on the FTB's May 26, 1999 "First Supplemental" privilege log, including those submitted for *in-camera* inspection:

a. *FTB 100126*: A portion of the redacted document is not discoverable and need not be provided to Hyatt. Specifically, the portion of the document beginning on the line where the date of 12/8/93 is stated, starting with the words "Richard Gould" through the sentence five lines from the bottom ending in "tax reporter." This protected portion of the redaction reflects advice from Richard Gould, another FTB in-house lawyer, in 1993. The Discovery Commissioner, in making this finding, draws a distinction between Mr. Gould and Ms. Jovanovich finding that, at this time and based on the existing record, Mr. Gould does not appear to be an integral part of the audit at that time. The remaining redacted information beginning with the word "discussed" through the end of the page must be produced as it does not relate to Mr. Gould.

b. *FTB 100139*: The redacted portion of the document is ordered produced as it relates to Ms. Jovanovich. It is ordered produced on the same grounds discussed above in ¶¶ 4 and 6 regarding Ms. Jovanovich's integral role in the Hyatt audits, assessments, and protests.

c. *FTB 100209*: The document is a typewritten transcript of FTB 100126 discussed above. The same portions of the redacted document ordered produced in FTB 100126 will be produced here for the same reasons, the same portions of the redactions found not discoverable in the FTB 100126 are not discoverable from this document for the same reasons stated above.

d. *FTB 100218*: The redacted portion of the document is ordered produced. It is ordered produced as the one sentence redaction does not give legal advice and is not a communication relating to legal advice.

e. *FTB 100288*: This document has already been produced and no privilege attaches to it.

f. *FTB 100289 thru 100292*: These documents, a memo on sourcing compiled by Monica Embry as a response to Allen Shigemitsu's already-produced memo on the same subject, are ordered and produced as neither the attorney-client nor deliberative-process privileges are applicable, based on the same grounds discussed in ¶¶ 4 thru 6 above.

g. *FTB 100401*: This is a duplicate of FTB 100218. The same ruling for FTB 100218 applies to this document.

h. *FTB 100908 thru 100909*: These documents are ordered produced as they relate to Ms. Jovanovich. They are ordered produced on the same grounds discussed above in ¶¶ 4 and 6 above regarding Ms. Jovanovich's integral role in the Hyatt audits, assessments, and protests.

i. *FTB 101634 thru 101645*: These documents are ordered produced as they relate to Ms. Jovanovich. They are ordered produced on the same grounds discussed in ¶¶ 4 and 6 above regarding Ms. Jovanovich's integral role in the Hyatt audits, assessments, and protests.

j. *FTB 101646 thru 101656*: These documents are ordered produced as they relate to Ms. Jovanovich. They are ordered produced on the same grounds discussed in ¶¶ 4 and 6 above regarding Ms. Jovanovich's integral role in the Hyatt audits, assessments, and protests.

k. *FTB 104117 and FTB 03096 and FTB 104122 and FTB 03091*: These documents are Carol Ford's review notes. These documents are ordered produced in

their entirety. The FTB asserted the deliberative-process privilege, but deliberative process privilege is inapplicable for the reasons set forth in ¶ 5 above. Given that there is no applicable privilege, there is no reason for the Discovery Commissioner to review these documents *in-camera*. The documents are to be produced directly to Hyatt.

l. *FTB 07381*: This document is ordered produced without redactions. It is a memorandum prepared by Ms. Jovanovich while employed by the FTB and working on the Hyatt audits. It is ordered produced on the same grounds discussed above in ¶¶ 4 and 6 regarding Ms. Jovanovich's integral role in the Hyatt audits, assessments, and protests.

m. *FTB 104058 thru 104080 and 104081 thru 104116*: These withheld documents are not currently discoverable and need not now be provided to Hyatt, pending further court review of the circumstances of their preparation. These are two memoranda generated by Anna Jovanovich *after* her employment with the FTB ended and while she was retained by the FTB as a consultant specifically for this litigation. The FTB is ordered to produce *in-camera* supporting documentation demonstrating how and when the documents were generated. In the event Ms. Jovanovich is used or retained as an expert by the FTB, these documents shall be immediately produced to Hyatt.

n. *FTB 05938 thru 05965*: These withheld documents are not discoverable and need not be provided to Hyatt. These are news items obtained via Lexis.

o. *Self appraisal reports and evaluations*: These documents were submitted to the Court for *in-camera* review on September 10, 1999. They consist of the

self-appraisal reports and evaluations of Sheila Cox, Carol Ford, Sheila Samana, Jahna Alverado, and Felix Sorriano. These documents are not discoverable and need not be provided to Hyatt as they do not contain any information relevant to the issues in this case.

10. Hyatt's counsel identified during the November 9, 1999 hearing additional Hyatt-specific documents not produced by the FTB nor listed on its log. These documents are ordered to be submitted for an *in-camera* review. These include the Shigemitsu Reply Memo, the Jovanovich e-mail referenced during her deposition, the Bob Dunn e-mail to Sheila Cox, the Carol Ford handwritten notes, if any, and the Sheila Cox time sheets, if any.

11. Certain documents listed on the FTB privilege log, but not submitted *in-camera*, are ordered to be submitted to the Court for an *in-camera* review. Specifically, these include the pictures and memo identified on the FTB's May 26, 1999 "First Supplemental" privilege log as FTB 05994 to 05996. In addition, the Bob Dunn e-mail the FTB referenced on page 34 of its Post-Hearing Memorandum relating to the memo and pictures is to be submitted *in-camera*.

12. All documents, including redacted portions of documents, ordered by the Court during the November 9, 1999 hearing to be produced to Hyatt must be produced by the FTB to Hyatt by November 30, 1999.

13. All documents ordered by the Court during the November 9, 1999 hearing to be submitted *in-camera* to the Court must be submitted by the FTB to the Court by November 30, 1999. Counsel for Hyatt must be served with a privilege log from the FTB listing all documents

being submitted *in-camera*. Any prior *in-camera* submissions by the FTB, including but not limited its submission on September 10, 1999 for which a log was not provided to Hyatt's counsel, must be served on Hyatt's counsel by November 30, 1999.

14. The Discovery Commissioner heard additional oral argument in regard to the issue of whether to sanction the FTB for its failure and refusal to produce Anna Jovanovich for deposition or provide her last know address. The Discovery Commissioner denied Hyatt's request for costs for having to bring the Motion for an order compelling production of witness Anna Jovanovich for deposition testimony or her current address.

DATED this 7th day of ~~November~~ December, 1999.

/s/ Thomas W. Biggar
DISCOVERY COMMISSIONER

Submitted by:

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/s/ Mark A. Hutchison
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NOTICE

Pursuant to NRCP 16.1(d)(2), you are hereby notified you have five (5) days from the date you receive this document within which to file written objections.

[Pursuant to E.D.C.R. 2.34(f), an objection must be filed and served no more than five (5) days after receipt of the Commissioner's Report. The Commissioner's Report is deemed received when signed and dated by a party, his attorney or his attorney's employee, or three (3) days after mailing to a party or his attorney, or three (3) days after the clerk of the court deposits a copy of the Report in a folder of a party's lawyer in the Clerk's office.]

A copy of the foregoing Discovery Commissioner's Report was:

___ Mailed to Plaintiff/Defendant on the ___ day of ___, 1999 at the following address:

James W. Bradshaw, Esq.
McDonald Carano Wilson
McCune Bergin Frankovich & Hicks
241 Ridge Street, 4th Floor
Reno, Nevada 89508
Attorney for Defendant

[BOTH]

✓ Placed in the folder of Plaintiff/Defendant's counsel in the Clerk's office on the 7th day of December, 1999.

SHIRLEY R. PARRAGUIRRE

By: /s/ Mary Daigle
MARY DAIGLE
Deputy Clerk

Case Name: *Hyatt v. Franchise Tax Board*

Case Number: A382999

ORDER

The Court, having reviewed the above report and recommendations prepared by the Discovery Commissioner, and,

_____ The parties having waived the right to object thereto,

_____ No timely objections having been filed thereto,

✓[pw] Having received the objections thereto and the written arguments in support of said objections, and good cause appearing,

__/__ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted.

_____ IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted as modified in the following manner. (attached hereto)

_____ IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report is set for _____, 1999.

Dated this 21st day of December, 1999.

/s/ Nancy M. Saitta
DISTRICT COURT JUDGE

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff, VS. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive, Defendants.	)	**CERTIFIED COPY** NO. A382999

VOLUME 1

DEPOSITION OF CANDACE VANESSA LES

LOS ANGELES, CALIFORNIA

TUESDAY, JANUARY 11, 2000

REPORTED BY:

Jean F. Holliday

CSR No. 4535, RPR

* * *

[10] BY MR. BOURKE:

Q. What was it that caused you to decide not to be a friend with her anymore?

A. As I stated then and now, it's philosophical and spiritual differences.

Q. Did any of those differences relate to racism?

A. Yes.

Q. Could you tell me what you have in mind about Sheila Cox being a racist?

A. It would be my opinion that Sheila Cox is a racist.

Q. Did Sheila Cox ever talk to you relating to the Gil Hyatt case and say anything that could be regarded as racist?

A. I believe so, yes.

Q. And what did Sheila Cox say?

A. Sheila Cox said, "I'm going to get that Jew bastard."

Q. Did she say anything about Grace Jeng?

A. Yes.

Q. What did she say?

A. I don't feel right. She said – she would refer to Asian people as gooks and Grace Jeng also.

[11] Q. Now, did Ms. Cox ever tell you what Ms. Jeng's relationship with Gil Hyatt was?

A. Yes.

Q. What did she say?

A. She said that Grace was Gil's girlfriend.

Q. Did she refer to her as a gook girlfriend or an Asian girlfriend?

MR. WILSON: Objection, the question is leading.

BY MR. BOURKE:

Q. In what way would she refer to Grace Jeng?

A. Well, in reference that Grace was part of the whole tax evasion of Gil Hyatt, that was his girlfriend, she's this Asian lady, you know, she's this – then she started auditing her and . . .

Q. Did you regard what she said about Mr. Hyatt being Jewish as a slur?

A. Well, a racial epithet, you know, to call someone a Jew bastard.

* * *

[22] Q. And during that time period did she have other close friends at the FTB?

A. Maybe.

Q. But would you think that based on your knowledge of her, you were the closest friend she had at that period of time?

A. I believe so, yes.

Q. During that time period how often would you see Sheila Cox?

A. One period of time we – like the apex of our friendship we were going to school together at night and so Monday and Tuesday night it would be from, you know, after work, like 4:00 o'clock till 10:00 o'clock and then on Wednesday she had a third class and she'd stay in town at my house. So I saw her a lot and then we'd hang out sometimes on the weekends.

Q. You'd hang out meaning you would go out to dinner and things like that?

A. Stuff with my daughter, we'd sew pillows or, you know, make stuff.

Q. Now, during the time that you were friends with Gil – I'm sorry, with Sheila Cox, did she talk to you about the Gil Hyatt work that she was doing?

[23] A. Yes, she did.

Q. And did she tell you the details of the work she was doing?

A. Yes, she did.

Q. And at that time did you have any official role in the audit?

A. No, I didn't.

Q. Did she tell you about any interviews with Mr. Hyatt's relatives?

A. Yes, she did.

Q. What did she tell you about those?

A. That she got affidavits from Gil Hyatt's ex-wife and daughter and maybe somebody else in San Diego or something.

Q. Could that other person have been his brother?

A. A brother, yeah.

Q. And did she tell you about their attitude towards him?

A. They – yes.

Q. What did she say?

A. That they hated him.

Q. Did she tell you why they hated him?

A. Yeah.

Q. What did she say?

[24] A. That he was a bad man. They hated him.

Q. And was that her attitude towards him?

A. I believe it was.

Q. Did she say anything about investigating his La Palma, California former house?

A. Yes, she did.

Q. What did she tell you?

A. She said that she investigated the former La Palma house.

Q. Did she say how she did that?

A. How? How? Like what how?

Q. Well, did she say that she had gone there personally?

A. Oh, yes, she said she had gone there personally.

Q. How many times did she say she went there?

A. I don't recall.

Q. Do you recall whether she said she had seen any neighbors?

A. Yes.

Q. Did she describe those neighbors for you?

A. Yes.

[25] Q. What did she say?

A. She said that the neighborhood in a cul-de-sac was like on lookout and there was one guy in particular who had one arm who was like the lookout guy and it was really creepy.

Q. When she says on the lookout what did you understand her to mean?

A. The lookout for FTB residency auditors.

Q. Did she say how she knew that they were on the lookout for FTB?

A. No, she didn't.

Q. Did she say how old this one-armed man was?

A. I believe he was described as an old one-armed man.

Q. Did she say that his arm was cut off at the elbow or at the mid arm or –

A. One armed, that's it.

Q. Did she have any other names or words she used to describe the neighbors or associates of Gil Hyatt?

A. She told me it was a cast of ghouls looking out for – like on lookout for State auditors.

* * *

[42] Q. How did it happen that you went to visit Mr. Hyatt's house and his apartment?

A. Sheila said that she wanted to.

Q. Who –

A. And she was driving.

* * *

[51] Q. Ms. Les, could you tell me how long, approximately, it was that you and Ms. Cox took to visit Gil Hyatt's house in Las Vegas in November 1995?

A. It seems like two hours and 45 minutes.

Q. Now, how long did you take to visit the apartment complex of Mr. Hyatt?

A. Well, that's why it seems so long because we couldn't find that Pecos Street, I remember that clearly and distinctly and –

Q. So was the two hours and 45 minutes including both locations or was that just the house?

A. I think it was both locations.

Q. So you made a deliberate effort to find the Pecos location of the apartment complex. It wasn't just your driving by and happened to see gee, whiz, there is Gil Hyatt's apartment complex?

A. Sheila made a deliberate effort to find the apartment complex.

Q. Did she talk to you during this two hours and 45 minutes about why she wanted to see these places?

A. Yes, she did.

Q. What did she say?

[52] A. She said she wanted to see his house because at the end of the audit the taxpayer claimed he had built a berm on his house and she wanted to see the berm and she wanted to get some photographs or see the Wagon Trails again because I think she mentioned that she had been there before and that's what it was.

Q. Did she say why she wanted to take photographs?

A. I don't recall.

Q. Did she say what a berm was?

A. I think we looked up berm in the dictionary because we didn't know what berm was.

Q. Well, I'll be happy to get one from the shelves here but if you recall, what is your recollection of the definition of what a berm is?

A. A hillside to – yeah.

Q. Now, on Mr. Hyatt's house is there a small hill in the front of the house coming up from the road?

A. It appeared there was a berm.

Q. Now, did you take some photographs?

A. I didn't take any photographs. Sheila took photographs.

* * *

[59] Q. Do you know how many times Sheila Cox went by this celebrity's house?

A. I know of at least three times.

Q. So this was a house in Beverly Hills?

A. This is a house in Beverly Hills.

Q. Did you talk to Sheila Cox about her going three times to this celebrity's house?

A. Talk to her?

Q. Yes.

A. Like what?

Q. Was she proud of it what she was doing?

A. I believe she was proud of it, yes.

Q. Why was she proud of it, did she tell you anything? What did she tell you about it?

A. I think she regarded herself as, you know, some kind of sleuth, you know, residency sleuth and that, you know, she was doing the job and so she was a little braggadocio with it.

Q. Did she brag about any of her other cases?

A. Yes.

Q. Did she brag about the Gil Hyatt [60] audit?

A. Yes, she did.

Q. What did she say about the Gil Hyatt audit?

A. She did a really great job.

Q. Did she tell you – did she brag about her Gil Hyatt audit not only with you in private but also in front of other auditors?

A. I think to a lesser extent.

Q. Did she talk about the Gil Hyatt audit in the residency meetings that would be held periodically?

MR. MOSS: This is about Gil Hyatt you're asking about?

MR. BOURKE: Yes.

MR. MOSS: You should answer the question.

THE WITNESS: I'm sorry, the question again?

BY MR. BOURKE:

Q. Did she talk about the Gil Hyatt audit in the residency meetings that would be held periodically?

A. Yes, she did.

* * *

[61] Q. And how many occasions do you recall Sheila Cox mentioning the Gil Hyatt audit?

A. Well, it's hard to discern because I was her friend and she talked about it constantly and so with me, with other people –

MR. MOSS: I think he's referring to at these meetings.

BY MR. BOURKE:

Q. At the meetings.

A. Oh, at the meetings? She'd talk about one aspect of the case and that was like her case du jur, you know, she – seemed like year after year she was talking about the Gil Hyatt audit, seemed like.

* * *

[62] MR. BOURKE: We don't need to argue it so what I'm going to do is ask the court reporter to reread the question and we'll get it again maybe without the word "seems like." Could you reread the question?

(The record was read.)

MR. MOSS: I –

THE WITNESS: Often.

MR. MOSS: I asked a clarifying question about at these meetings.

MR. BOURKE: Right.

MR. MOSS: So at the meetings, these RAIN meetings how often at the RAIN meetings?

THE WITNESS: I believe if she was speaking at the monthly or biweekly RAIN meetings she was speaking about the Gil Hyatt audit.

BY MR. BOURKE:

Q. Did you get the impression that the Gil Hyatt audit was a big part of her case load?

A. More than an impression. I knew that [63] it was a big part of her case load.

Q. And how did you know that?

A. She told me and I could ascertain that.

Q. Did you ever get the impression or the sense during your audits that sometimes an auditor would get fixated on a particular audit?

A. Absolutely.

Q. And did that happen to Sheila Cox?

A. Sheila also, yes.

Q. And on what case did Sheila Cox get fixated?

A. I believe the Gil Hyatt case she was obsessed with.

Q. And when you say obsessed what do you mean?

A. Talk about incessantly, inability to let go even after it was closed to the point where she created a real fiction in her head about it, in my opinion.

MR. WILSON: Objection, opinion testimony.

BY MR. BOURKE:

Q. Have you seen other auditors get obsessed with their cases?

A. I believe so, yes.

* * *

[69] Q. Was it your understanding that visiting a taxpayer house for curiosity was forbidden by privacy regulations of the FTB?

A. I don't know about that, that it was forbidden by privacy regulations per se.

Q. Was it forbidden by the FTB rules and regulations?

A. As far as my understanding, it wasn't permissible.

Q. You talked about Sheila Cox being obsessed with the Gil Hyatt case. Do you recall whether or not Sheila Cox ever had a case as big as the Gil Hyatt case?

A. I do recall that she didn't.

Q. And did she tell you that it was the biggest case she ever had?

A. Yes she did.

Q. Did she tell you how big the Gil Hyatt case ranked in terms of other cases at the Franchise Tax Board residency unit?

A. I believe we had a conversation where she speculated, you know, just based on polling other auditors.

[70] Q. What did she think based on her poll?

A. That it had the largest tax potential, one of the largest tax potentials in the unit at that time.

Q. Did she say it had one of the largest or was the largest?

A. I think she told me that it was the largest at that time.

* * *

[101] Q. Now, with respect to your career with 300 cases and only two fraud cases, is that unusually low for the FTB or is that about right?

A. I'd say it's unusually high.

Q. So the FTB issues fraud penalties very extremely rarely?

A. From what I saw in my ten years, almost ten years, yes.

* * *

[113] Q. Now, when you read the materials Sheila Cox gave you on Gil Hyatt, included in the narrative was a fraud penalty question, correct?

A. Yes.

Q. Did you give her any comments about the fraud penalty case that Sheila Cox was building?

A. Yes, I did.

Q. What did you tell her?

A. I told her that it didn't look like fraud to me and that I felt that it would be inappropriate to send a letter like that to the taxpayer and that she needed to meet with the taxpayer and there she could glean out whether or not he was perpetrating a fraud.

Q. Do you know whether or not she ever met with the taxpayer?

A. To my knowledge I knew that she didn't.

Q. Did you ever find out whether or not she ever met with Grace Jeng?

A. I can't recall.

Q. Do you recall whether or not she ever met with Gil's relatives that were friendly to him?

A. This I – oh, friendly relatives?

Q. Friendly.

[114] A. I don't recall that she met with friendly relatives.

Q. Do you recall that she met with unfriendly relatives?

A. This I recall.

Q. Do you recall whether she ever tried to interview the one-armed man that was a neighbor at the house?

A. I don't recall that she ever tried to interview him.

* * *

[168] Q. Did she ever tell you about how many information requests she was sending out and what she was observing about Mr. Hyatt?

A. She talked about it, yeah.

Q. What did she tell you?

A. That she was bombarding him with information document requests and as I said before, you know, she did talk incessantly about the audit.

Q. You had quite a bit of experience, maybe 60 or more residency audits and a total of 300 audits. Did you send out third-party information demands on a regular basis?

A. No.

Q. Did Sheila Cox?

A. My understanding, yes.

MR. WILSON: Objection, hearsay. I move it be stricken.

* * *

[171] Q. With respect to the narrative that you read on the Gil Hyatt case that Sheila Cox prepared, was it your impression that she was fabricating a stronger case than existed?

MR. WILSON: Objection, the question leads. Also may call for an assumption.

MR. BOURKE: Let me rephrase the question.

Q. When you read the narrative did you get any sense or form an opinion about the strength of the case?

A. When I read the closing letter and had been listening to Sheila talk about the case, I believe she created an entire fiction about the taxpayer.

Q. And why do you say that?

A. I believe – what do you mean why?

Q. What do you base – what did you base your conclusion about that she had created an entire fiction?

MR. WILSON: Object to the question. Go ahead [172] and answer if you can.

MR. BOURKE: Let me rephrase it.

Q. You came to a judgment based upon all your discussions with her and having read the narrative, or the closing letter, that she had come up with an entire fiction about Gil Hyatt, right?

A. Yes.

Q. What is it that led you to that belief?

MR. WILSON: Same objection.

THE WITNESS: It was a process. Over a period of time I saw her uncertain about the case. I saw her rack up a lot of hours on the case and I saw her try to get cosigners, her colleagues, on to the case, which wasn't going too well until she started flavoring it with details about one-armed men and making the taxpayer seem like a vial [sic] character, and it was over a period of time where this was done and then when I finally saw this, the proposed assessment, I thought she had created a fiction about this guy that – and this is how she got legal to buy into it.

* * *

[176] Q. Now let me ask about a fact and what you heard. Did you hear Sheila Cox say things that were – that seemed to be designed to get cosigners on her audit work on the Hyatt case?

A. As I recall, yes.

Q. And what is it that you recall her saying, to the best of your knowledge? You don't have to give me exact words, but the gist of what she was doing.

A. Well, she told the story about the one-armed guy. She talked about the secret girlfriend staying at the house on guard, too. She talked about like the cart before the horse, that this guy is a tax evader. He set up this whole thing in Las Vegas.

Q. That's how she would refer to Gil Hyatt?

A. Yeah. In the meetings I don't recall her saying Gil Hyatt.

Q. Did she refer to him as an inventor?

A. Yes.

* * *

[181] Q. What relevance does having a berm have to do with the audit? Why did she care, if you know?

A. Because that's what the taxpayer claimed.

Q. Because the taxpayer claimed that there was a berm in front of his house?

A. Yes.

Q. And so she was claiming that the taxpayer had lied or misrepresented something about the facts?

A. That was my understanding.

Q. And your observations corroborated, in your opinion, what the taxpayer had said?

* * *

Q. Now, did Sheila Cox, when she talked about the inventor in the residency meetings over the course of the years that she was handling the Hyatt audit, did she refer to him as someone claiming a Las Vegas residency?

[182] A. I think it was California nonresident.

Q. I see. Did she identify him as having anything to do with Las Vegas?

A. I don't think so.

* * *

DISTRICT COURT

CLARK COUNTY, NEVADA

CERTIFIED COPY

GILBERT P. HYATT,
Plaintiff,
vs.
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive,
Defendants.

NO. A382999

VOLUME 2

DEPOSITION OF CANDACE VANESSA LES

LOS ANGELES, CALIFORNIA

WEDNESDAY, JANUARY 12, 2000

REPORTED BY:

Jean F. Holliday

CSR No. 4535, RPR

* * *

[226] A. I went to tell Steve Illia, who was outside with Anna Jovanovich, you got to come in here and see Doug Dick.

Q. And why did you want him to come in and see Doug Dick?

A. I considered it a very wild presentation.

Q. Did you tell that to Steve Illia?

A. I did.

Q. And what did you tell him?

A. I said, "You got to come in here and see Doug Dick, this presentation, it's wild."

Q. What did Doug Dick say before that three minutes that you ran out, what had he been saying to the auditors of the FTB?

A. He was like in high glee doing this presentation on how to close an audit and he had these big poker chips about, you know, like with penalty or T and E, travel and entertainment expenses and just how you can kind of negotiate by shuffling the chips and putting them behind your back, you know, and then popping them out once you get this area, and it was really kind of like this Vaudeville routine on audit, you know, and I just thought it was really weird and so I knew that Steve wasn't in the [227] room and I wanted him to come in and see it.

Q. Now, could you describe for us that big poker chip that you mentioned? How big was it? Could you show the camera?

A. It was like bigger than a poker chip, you know.

Q. So was it made out of cardboard or something like that?

A. Something.

Q. And was it black?

A. Yeah, I think that the penalty one was black or they were all black. They were like negotiating chips that

you were going to use with the taxpayer to close audits, to settle audits.

Q. And the one that was most relevant for residency cases was which one? I mean travel and entertainment expenses are not a big item in residency cases, are they?

A. No.

Q. So which was the one that was applicable to residency cases?

A. Well, there was no residency chip. It's kind of an all or nothing situation.

Q. What I meant was isn't the penalty chip the one that was relevant for residency because [228] that's the main one you'd use?

MR. WILSON: Objection, the question leads and is suggestive. You may answer.

THE WITNESS: Well, I will say it was a residency conference.

BY MR. BOURKE:

Q. I see, okay. Did he talk about giving up the penalty at all in return for anything else?

A. As I recall, the penalty chip was used as a persuasive tool to I think get the taxpayer to agree or succumb to the adjustment.

Q. So whatever it was that the auditor really wanted to achieve, the auditor would achieve his goal on taxes by giving up a penalty chip?

MR. WILSON: Objection, the question leads.

THE WITNESS: I think that's what it was.

* * *

[245] Q. Is that ever thrown up to an auditor that his or her no change percentage is too big, as a way of criticizing the auditor?

A. Not in terms of no change percentage, but too many no changes.

Q. Too many no changes. Did you ever talk about whether – with Sheila Cox did you ever talk about with Sheila Cox whether the Gil Hyatt audit should be a no change?

A. Yes, I did.

Q. And what did you say to her and what did she say to you?

A. Well, we discussed for weeks about reclassifying the income because as I recall in the Gil Hyatt case it's intangible income, which treatment differs significantly from ordinary income, and so you know, we explored those possibilities, and there was nobody that I ever knew of and only one case in case law that we ever really saw, and that was a partnership, where you could – I mean I don't want to get all technical with this, but you could say that intangible income had acquired a situs in, you know, California and therefore should be taxed in [246] California, but it was really hard, the requirements for acquiring a situs. So other than reclassifying the intangible income, the royalty or patent income as ordinary income, you know, it was really hard. So she was getting like Allen Shigemitsu to help her see if there was some way to reclass that money and for weeks, you know, we would

talk about that, you know. It seemed rather – the possibility of reclass was kind of bleak, you know.

Q. Did you gather from what she was telling you that she was searching for ways to tax Mr. Hyatt?

A. Yes.

* * *

[253] Q. Now, did she ever call Mr. Hyatt any names?

A. Yes.

Q. What did she call him?

A. She did call Gil Hyatt, just as we talked about yesterday in the opening deposition, was Jew bastard, after she received his synagogue from Las Vegas support letter.

Q. Now, you said that she called one of the neighbors a one-armed man and another person saying that Mr. Hyatt was surrounded by ghouls. Did she ever have any other insult names that she used on Mr. Hyatt?

A. She called him a cheap bastard.

Q. What did she say about him being cheap?

[254] A. How cheap it was – this was in reference to Grace Jeng's tax returns. I think that she received – Grace Jeng received salary from Gil and –

MR. MOSS: Wait a second. Wait a second. Could she talk about Grace Jeng's –

MR. BOURKE: Grace Jeng is willing to waive any discussion about her tax situation that this witness learned at the FTB.

* * *

BY MR. BOURKE:

Q. Grace Jeng and Gil Hyatt, you can talk about both.

MR. MOSS: Sorry.

THE WITNESS: Sorry. Thanks. Yeah, that somehow the salary that Grace Jeng was being paid by Gil Hyatt, you know, for a millionaire, he was a cheap bastard.

BY MR. BOURKE:

Q. Did she ever call him a freak?

MR. WILSON: Objection, the question leads and suggests.

THE WITNESS: She did.

[255] BY MR. BOURKE:

Q. Was she afraid of him yelling at her or raising his voice?

A. I don't know what her fear stemmed from.

Q. Did she say why she felt he was a freak?

A. Yes.

Q. What did she say?

A. Sheila disclosed to me how Gil Hyatt's son was murdered in Huntington Beach and she thought that that made him a freak.

Q. Because some member of his family was a victim of a crime?

A. Because a member of his family was murdered and it was unsolved.

Q. Did she tell you anything about the murder of his son being a sensitive matter within the family and did you regard it as a sensitive matter?

A. I certainly did.

MR. WILSON: I object, the question leads. Go ahead.

THE WITNESS: It was a sensitive matter.

* * *

[263] Q. All right, during the 15 minutes did you get out of the car?

A. Yes.

Q. Did Sheila Cox get out of the car?

A. Yes.

Q. So was it just a drive-by?

A. No.

Q. Sheila Cox has testified that it was a drive-by. Does that refresh your memory that maybe it was just a drive-by?

A. It wasn't just a drive-by, although we drove by.

Q. You drove by but also stopped for 15 minutes?

A. Right.

Q. Did both of you get out of the car?

A. Yes.

Q. Now, with respect to Wagon Trails during that same visit in November 1995 did you and Sheila Cox drive to Wagon Trails?

A. Yes, we did.

Q. Did you stop the car?

[264] A. I believe so.

Q. Did you take a photograph?

A. Yes.

Q. And what was that photograph about?

A. Sheila took a photograph.

Q. Did she take two photographs?

A. I believe she took two photographs with my camera, yes.

Q. Now, at the house in Las Vegas, Gil Hyatt's house on Tara, did Sheila Cox take any photographs?

A. Yes.

Q. And what did she take a photograph of?

A. She took a photograph of me by Gil's house.

Q. Did she take any other photographs?

A. I think she took like three or four photographs at Tara.

Q. Did you take any photographs?

A. At Tara?

Q. Yes.

A. I think not.

Q. Did you take any photographs at Wagon Trails?

A. No.

* * *

[268] Q. Could you tell me what you and Sheila Cox did during the time you were at the Gil Hyatt house in November 1995 during that entire time up to 15 minutes?

A. Okay, as I recall we went to that Pecos Wagon Trails first and it took us so long, I think we talked about two hours and 45 minutes doing this whole tour of Gil Hyatt addresses on that map that was an exhibit, and we couldn't find the Pecos because there is like a lot of Pecos or something [269] like that and we were driving and driving and that took a long time, maybe an hour, and then as I recall, the Tara house was on the other side of town and we were driving, driving, driving. At this point I was carsick and I was like sitting on the curb and she was up at his house. I got out of the car and like plopped on the curb. I was sick, and she was at his window, at Gil Hyatt's window or at the house's window and then she went to the mailbox. She was looking through it. I believe it was trash day. She lifted up the trash lid and then I got up and I ran across the street to the Gil Hyatt side of the street. I was like come on, come on, let's get out of here, come on. She

came back to the car. She got my camera. She took some pictures. I think I sat down on the curb one more time and we got in and we left.

Q. Did you and she then talk about what had just gone on?

A. We talked about the berm.

Q. What did you say about the berm?

A. She said, "It doesn't look like a berm." I said, "That looks like a berm," and we drove away. We didn't really talk about that adventure.

* * *

[275] Q. Did you ever put the Hyatt house photographs into any audit file at the FTB?

A. No.

Q. Did you have any need to have a photograph of the Wagon Trails Apartments that Gil Hyatt used to live in?

A. I had no need for that photograph.

Q. Did Sheila Cox ever ask you for that photograph to be printed up and given to her?

A. No.

Q. Did you ever put that Wagon Trails photograph in any FTB file?

A. No.

Q. Was your visit to the Tara residence because you happened to be in the neighborhood and just decided to do a drive-by?

A. I believe the visit was a preconceived visit from Sheila planning to visit these various locations of Gil Hyatt's.

Q. Well, Sheila Cox testified that you and she were in the neighborhood and you just did a quick little drive-by without stopping. Is that untrue?

A. That's untrue.

* * *

[329] Q. Are you aware of any case where the Franchise Tax Board has proved that some Nevada person was not really a Nevada person and was just trying to evade California taxes?

A. No, I'm not aware of that.

Q. Does the Franchise Tax Board, during the time you were there, have a practice of researching wealthy Nevada persons?

A. I'm aware that that was a discovery project.

Q. And what is a discovery project?

A. You know, kind of like a auditor's brainstorm idea on how to find unreported income or new ways of finding nonresident taxpayers that should be paying tax in the state of California.

Q. And who gave this term discovery project to it, is that from upper management?

[330] A. I believe it was, yes.

Q. Is that from Steve Illia or even before him?

A. For some reason I attribute it to this Laura Buck supervisor out of San Bernardino in residency.

MR. WILSON: Bucks?

THE WITNESS: Buck.

BY MR. BOURKE:

Q. And how many discovery projects are you aware of that related to Nevada persons?

A. I can think of I think three offhand.

* * *

[347] Q. Did Sheila talk to you, in her conversations about the Hyatt case, about Gil Hyatt being a guy that was concerned about privacy?

A. She said that Gil Hyatt said he was concerned about privacy.

Q. Did she say anything about Gil Hyatt trying to keep his address secret or confidential?

A. Yes.

Q. Did she say anything about Gil Hyatt trying to keep his financial information confidential?

A. I don't know.

* * *

[389] Q. Did she talk about his house in a disparaging way, his former residence in California, did she say it was a crummy house or anything like that?

A. Yes. She said it was a dump.

Q. Did you ever ask her what she meant by saying it was a dump?

A. No.

Q. When she referred to Mr. Hyatt's personal assistant Grace Jeng as a gook girlfriend, was that in the presence of other auditors or just yourself?

A. She said it in front of me.

Q. So you don't recall her saying that at a residency audit meeting?

A. No.

* * *

[405] BY MR. BOURKE:

Q. All right, I take it that one of – now, could you tell me is the reason – did you have a reason for the statement you've made earlier in the deposition that you believe that this was trash day that you were visiting?

A. I recall trash cans and Sheila in the trash can.

* * *

DISTRICT COURT

CLARK COUNTY, NEVADA

CERTIFIED COPY

GILBERT P. HYATT, Plaintiff, VS. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive, Defendants.	)	NO. A382999

VOLUME 4

DEPOSITION OF CANDACE VANESSA LES

LOS ANGELES, CALIFORNIA

THURSDAY, JANUARY 20, 2000

REPORTED BY:

Jean F. Holliday

CSR No. 4535, RPR

* * *

[615] EXAMINATION

BY MR. BOURKE:

Q. Ms. Les, I'd like to refer to a topic we started on and that has to do with the assessments of penalties at the FTB. Do you recall that during your career you observed that the assessment of fraud penalties was very rare at the FTB?

A. Yes.

Q. Now, did you also observe that this is true not only in your own individual career but also for other auditors?

A. Yes.

* * *

[677] Q. Now, you a few lines later here at page 25 basically said you that you wanted – on line 25 you said you wanted Steve Illia to come and see Doug Dick because you considered it a very wild presentation. And the next page says that you told Steve Illia you've got to come in here and see Doug Dick. This presentation is wild. And what I'd like you to explain, please, is what did you consider wild about his presentation?

A. Well, it was kind of like a secret, you know, about the close of an audit, you know, and what an auditor might say to a taxpayer, you know. I mean I often wondered and I asked, you know, other auditors like, you know, how do you do your closing conferences? Because I had one for every single one of my audits, I'm wondering, you know, what they did. And you know, you hold those cards close to your vest as an auditor, right, with that enormous risk because it's all on you. And you know, you wonder, you speculate what your colleagues are doing, and there are certain things you didn't talk about at Franchise Tax Board. You didn't talk about the cost benefit ratio. You didn't talk about, you know, how many cases you closed or the number of adjustments or [678] really what it was like at the end of an audit, what you used to get the taxpayer to agree to the facts, to succumb to the adjustment, you know.

MR. MOSS: Why did that make his presentation wild?

THE WITNESS: He was just saying it, he was like up front with like this whole thing; look, you use these negotiation chips. It was like what, are you giving us the green light to take a penalty chip and hold it over the taxpayer's head? I'd never heard that verbalized. I'd certainly never seen it in a routine and I just considered that wild.

* * *

[684] BY MR. BOURKE:

Q. Now, directing your attention again to the Doug Dick presentation, we are looking at an exhibit that we marked, I think it's 299, do you have that in front of you? Would you look at page 26 there?

A. Okay, yes.

Q. And lines 12 and 13 – well, 11, 12 and 13 you are saying that Mr. Dick was in high glee during this presentation on how to close an audit and he had these big poker chips about, you know, like with penalty or T and E, travel and entertainment expenses. Could you talk about what he said about a [685] poker chip and the penalty?

A. It was like and then this chip and it was a black chip and it said penalty. He goes and this chip that you've got behind your back, you say well, I don't know about – let's close the audit and like hesitating when to come in with that penalty chip. You know, like let's close it. Okay, do we have an agreement on the travel and entertainment expenses? And then through his presentation the chip would come back and forth, the black penalty one.

* * *

[687] you said, "As I recall, the penalty chip was used as a persuasive tool to I think get the taxpayer to agree or succumb to the adjustment." What did you mean when you said "get the taxpayer to agree or succumb to the adjustment"?

A. Well, two different things, they agree or succumb. I mean taxpayers will cry uncle if you twist their arm hard enough.

* * *

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive Defendants.	Case No.: A382999 Dept. No.: XVIII Docket No.: R **AFFIDAVIT OF SHEILA COX**

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

SHEILA COX being first duly sworn upon oath deposes and says as follows:

1. I am a certified public accountant licensed in the State of California and employed by the California Franchise Tax Board (the "FTB") as an Associate Tax Auditor.

2. I was hired by the FTB in June 1991 as a Tax Auditor, and served in that capacity until July 1995, when I became an Associate Tax Auditor. Between June 1996 and December 1996, I served as a Special Investigator. From December 1996, to the present, I have worked in the capacity of an Associate Tax Auditor. I make this affidavit in my official capacity and no other. This Affidavit is made of my own personal knowledge and, if called as a witness, I would competently testify thereto.

3. In November 1994, the FTB assigned me to work on the residency audit of Gilbert P. Hyatt's 1991 California Income Tax Return, which had been in progress since June 1993. The first thing that I did was thoroughly review and analyze the audit records and workpapers, which I was charged to maintain and control.

4. The Hyatt audit file contains Mr. Hyatt's California Nonresident Part-Year Income Tax Return for 1991. A true and correct copy of Mr. Hyatt's 1991 return is attached as Exhibit 1.

5. The Hyatt audit file indicates that to initiate the FTB's 1991 audit of Mr. Hyatt, the FTB sent two notice Letters (FTB form 4891-39) to Hyatt's claimed Nevada address on June 17, 1993 and July 1, 1993. True and correct copies of the notice letters are attached hereto as Exhibit 2.

6. True and correct copies of the Powers of Attorney from Mr. Hyatt that are in the audit file are attached as Exhibit 3.

7. The Hyatt audit file indicates that the FTB mailed a cover letter and one of its standard forms ("FTB 3805F"), requesting basic information about residence status, to Hyatt's Las Vegas accountant, Michael W. Kern on July 15, 1993. A true and correct copy of this letter from the audit file is attached as Exhibit 4.

8. A true and correct copy of Mr. Hyatt's August 4, 1993 response to the FTB's July 15, 1993 letter is attached as Exhibit 5.

9. During the 1991 Hyatt audit, I learned that Mr. Hyatt had a California doctor's appointment on September 26, 1991, and told this to Hyatt's accountant. A true and correct copy of the letter from the doctor that I received conveying this information is attached as Exhibit 6; a true and correct copy of my letter conveying this information to Mr. Hyatt's accountant is attached as Exhibit 7. In response, Mr. Hyatt changed his claimed move date from September 25, 1991 to September 26, 1991, and alleged that on September 26, 1991, after he visited his doctor in California, he left for Nevada to begin establishing his residence and business there. A true and correct copy of the September 22, 1995 letter changing Mr. Hyatt's claimed move date is attached as Exhibit 8.

10. Despite my repeated requests and the promise of Mr. Hyatt's accountant to do so, Mr. Hyatt failed to provide any substantiation and corroborative documentation that he either moved his personal effects from his La Palma, California home to Nevada or acquired furnishings for his alleged Nevada residence. True and correct copies of my multiple request letters on this subject are attached as Exhibit 9. A true and correct copy of the letter from Mr.

Hyatt's accountant promising to provide such information is attached as Exhibit 10.

11. During the audit, Mr. Hyatt ultimately claimed that he had no moving receipts and that he moved himself using his family's trailer, providing a Nevada motor vehicle registration statement dated June 1992, for a trailer issued in the name of his son. A true and correct copy of the February 22, 1995 letter from Mr. Hyatt's lawyer conveying this information is attached as Exhibit 11.

12. Credit card statements that Mr. Hyatt's representatives provided me during the 1991 Hyatt audit showed evidence of dining charges in California on several of Hyatt's credit cards from September 1991 through March 1992, including a charge at a California restaurant on October 2, 1991, and Nevada dining charges on only one day from January 2, 1991 through March 16, 1992. Attached as Exhibit 12 is a list of dining charges compiled from these credit card statements.

13. I had to send five separate request letters to Mr. Hyatt's accountant to get the credit card statements that showed the dining charges described in the previous paragraph. True and correct copies of my request letters are attached as Exhibit 13.

14. The Hyatt audit file contains a September 8, 1993 letter from Mr. Hyatt's accountant enclosing a lease agreement for a Las Vegas apartment that began on October 20, 1991. A true and correct copy of this letter from the audit file is attached as Exhibit 14.

15. I asked Mr. Hyatt's attorney in writing on two occasions where Hyatt stayed during the time between the

earliest date he claimed he changed residency (September 25, 1991) and the start date of his rental agreement (October 20, 1991). True and correct copies of my request letters dated August 31, 1995 and September 26, 1995 are attached as Exhibit 15.

16. During the Hyatt audits, I never received any explanation or documentation from Mr. Hyatt's accountant or attorney of where Mr. Hyatt stayed in Nevada between September 25, 1991 and October 20, 1991.

17. In the September 22, 1995 letter from Mr. Hyatt's attorney that is attached as Exhibit 8, Mr. Hyatt's attorney informed me that Mr. Hyatt was in Washington, Texas, and New York from October 14, 1991 to October 22, 1991.

18. When I and another FTB auditor interviewed the manager of the Wagon Trails Apartment complex, the Las Vegas complex where Mr. Hyatt claimed to have rented an apartment, she informed us that the complex served many tenants receiving federal HUD subsidies. The apartment manager also informed us that she did not remember seeing Hyatt often, and that he paid the rent ahead of time with a post dated check. The manager showed us Hyatt's rental file, which contained one envelope that had Hyatt's Las Vegas post office box as a return address, but was postmarked from Long Beach, California. My narrative notes of the March 1995 Las Vegas, Nevada field visit that included this interview, attached as Exhibit 16, show that the postmark was dated December 8, 1991.

19. I could never verify Mr. Hyatt's claimed Nevada civic and social affiliations that began earlier than April 1992. My letters to the computer hobby group and Jewish temple addresses that Mr. Hyatt gave were returned as

undeliverable. True and correct copies of the returned envelopes are attached as Exhibit 17. Mr. Hyatt's accountant later told me that Mr. Hyatt provided the wrong temple in the initial response, and gave the name of another temple, but this second temple did not respond to my inquiry. The Nevada Development Authority that Hyatt identified in his response had no record of his membership. A true and correct copy of the response from the Nevada Development Authority stating this is attached as Exhibit 18. The Nevada Governor's office had no record of any contact with Mr. Hyatt. Exhibit 19 is a true and correct copy of the letter from the Nevada Governor's office stating this. The Nevada Senator's office did not respond to my inquiry.

20. The Nevada school tutoring program that Mr. Hyatt claimed to have assisted beginning in April 1992 could not verify his alleged volunteer activity. True and correct copies of my relevant telephone notes and school district letter stating this are attached as Exhibit 20.

21. The Hyatt audit file indicates that when the FTB asked for escrow documentation for the sale of Mr. Hyatt's California home, Mr. Hyatt provided copies of three non-notarized, unrecorded documents: a grant deed, a promissory note, and a trust deed. Exhibit 14. The audit file reflects that the FTB then asked the Recorder's Office in the appropriate California county for recorded documents concerning the property transfer, and that the Recorder's office provided what appeared to be the same grant deed, notarized, and recorded on June 16, 1993. True and correct copies of the FTB's request letter to the Recorder's Office and the recorded grant deed in the audit file are attached as Exhibits 21 and 22, respectively.

22. Excerpts from two licensing agreements between Mr. Hyatt and electronics companies in the Hyatt audit file that are dated after Hyatt's claimed move to Nevada list a California mailing address for Mr. Hyatt. True and correct copies of these licensing agreement excerpts in the audit file are attached as Exhibit 23.

23. In March 1995, I went to Las Vegas, Nevada to make a field visit on the 1991 Hyatt audit. I was accompanied by another FTB auditor who was visiting Las Vegas on her own cases, and who served as a witness to my work on the Hyatt audit during the field visit. The field visit took place over three consecutive business days. Only part of each day was spent working on the Hyatt audit.

24. My narrative notes of the March 1995 Las Vegas field visit, attached as Exhibit 16, accurately describe the actions that I and the other FTB auditor took on the Hyatt audit during the visit. I prepared these narrative notes the day after returning to California from the Las Vegas trip. They are included as a part of the FTB's audit file concerning Mr. Hyatt.

25. During the March 1995 field visit, when a contact with a Nevada citizen required it, I identified myself as a California Franchise Tax Board employee and showed my Franchise Tax Board identification card. A true and correct copy of my identification card is attached as Exhibit 24. If any person contacted requested information about the reason for the inquiry, I stated that it was regarding a tax matter. Neither I nor the auditor accompanying me revealed Mr. Hyatt's name during any such contact unless necessary and we never disclosed Mr. Hyatt's social security number or comparable specifics about Mr. Hyatt to anyone during the field visit.

26. During the end of November 1995, I accompanied another FTB auditor to Las Vegas to assist on the other auditor's cases. During the trip, because the other auditor's case work was in the vicinity of Mr. Hyatt's claimed residence, I made a brief observation of it. I made no inquiries with other persons during this trip concerning the residency of Mr. Hyatt.

27. The FTB's audit file for Mr. Hyatt reflects that the Hyatt audit involved phone contacts with Nevada third parties between July 15, 1993 and September 27, 1995. Attached as Exhibit 25 is a schedule containing all of the notes of phone contacts with Nevada third parties during the audit that are contained in the Hyatt audit file.

28. The FTB's audit file reflects that the Hyatt audit involved mail contacts with Nevada third parties between July 15, 1993 and September 27, 1995. The audit file reflects that these mail contacts were either by letter alone, or by a letter accompanied by a "Demand to Furnish Information," a standard FTB form.

29. The audit file reflects that the FTB's mail correspondence by letter alone involved twenty letters to fifteen Nevada recipients: the Department of Motor Vehicles (two letters), the Las Vegas Postmaster (three letters), five Clark County Government agencies (seven letters), Nevada Governor Robert Miller, Nevada Senator Richard Bryan, Dr. Steven Hall (Mr. Hyatt's dentist), University Medical Center, KB Plumbing, Mr. Pryor (a resident in Mr. Hyatt's claimed Las Vegas neighborhood), Mr. Eggers (another resident), and Allstate Sand and Gravel. True and correct copies of all of these letters from the Hyatt audit file are attached as Exhibit 26.

30. The audit file reflects that the FTB's mail correspondence by cover letter enclosing an FTB "Demand to Furnish Information" involved fifteen letters to twelve Nevada recipients, including: Temple Beth Am (two letters), the Sports Authority (two letters), Nevada Development Authority, Personal Computer Users Group, Bizmart, Sam's Club, Congregation Ner Tamid, Las Vegas Valley Water District, Silver State Disposal Service, Southwest Gas Corp., Las Vegas Sun (two letters) and the Wagon Trails Apartments. True and correct copies of all of this correspondence from the Hyatt audit file is attached as Exhibit 27.

31. 78% of the FTB's third party contacts in Nevada by mail or phone described above were to persons or entities that Mr. Hyatt identified on his initial response to the FTB's request for residency information.

32. Certain FTB correspondence from California to Mr. Hyatt or his representatives in Nevada that occurred during the Hyatt audits has previously been identified in this affidavit as Exhibits 2, 4, 7, 9, & 13. The remaining FTB correspondence from California that occurred during the Hyatt audits where a representative of Mr. Hyatt's in Nevada is the recipient is attached as Exhibit 28.

33. Attached as Exhibit 29 is a schedule containing all of the notes of phone contacts with Hyatt's Nevada accountant during the audit that are contained in the FTB's audit files for Mr. Hyatt.

34. I spent less than three business days physically in Nevada and nominal hours on phone and mail contacts from California to Nevada to verify Mr. Hyatt's claims as compared to the total 624 hours the FTB spent on the 1991 audit.

35. The audit file shows that the FTB contacted the Clark County Department of Election Records and was informed that on July 5, 1994, Mr. Hyatt filed a voter registration affidavit to change his claimed voter registration address to 5441 Sandpiper Lane, Las Vegas, Nevada 89102. A true and correct copy of the 1991 narrative report discussion of "Voter Registration" and record of this discussion is attached as Exhibit 30. I verified through a "Lexis" search that the above property was owned by Michael and La Dawn Kern, Mr. Hyatt's accountant, and that the Kerns had sold the property on October 27, 1994 and had purchased another property on June 3, 1994. A true and correct copy of the Lexis printout is attached as Exhibit 31.

36. All of the actions that I took involving Mr. Hyatt were for the purpose of determining whether Mr. Hyatt had established significant ties with Nevada and had severed significant ties with California at the time that he claimed.

37. I determined that Mr. Hyatt had not established significant ties with Nevada and had not severed significant ties with California during 1991.

38. I was assigned to work the residency audit of Mr. Hyatt for 1992 which was initiated based upon facts developed during the audit of 1991, which showed that Mr. Hyatt had not established significant ties to Nevada during 1991 and continued to have significant California ties beyond 1991. A true and correct copy of a letter dated January 19, 1996 to Eugene Cowan is attached as Exhibit 32.

I hereby affirm under penalty of perjury that the assertions of this Affidavit are true.

DATED this 21st day of January, 2000.

/s/ Sheila Cox
Sheila Cox

SUBSCRIBED and SWORN to before me
this 21st day of January, 2000.

/s/ Linda Richardson
Notary Public

[SEAL]
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DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive, Defendants.	Case No. A382999 Dept No. XVIII **AFFIDAVIT OF EUGENE G. COWAN IN OPPOSITION TO THE FTB'S MOTION FOR SUMMARY JUDGMENT** FILED UNDER SEAL BY STIPULATION AND ORDER DATED FEBRUARY 1, 1999

(Filed Mar. 22, 2000)

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AFFIDAVIT OF EUGENE G. COWAN

STATE OF CALIFORNIA §
§ ss.
COUNTY OF LOS ANGELES §

EUGENE G. COWAN, being first duly sworn, deposes and says:

I. Background and expertise.

1. I am a member of the California Bar and have been a practicing attorney for over 18 years. I am a Principal of the firm of Riordan & McKinzie, a professional corporation. I have been affiliated with Riordan & McKinzie for over 13 years, and have been a Principal of the firm since 1990. Specifically, I am a Principal in Riordan & McKinzie's Tax/Probate Department, and I practice in the area of taxation including real estate and other partnership syndication, income tax planning for individuals, business and tax exempt organizations and state and local income, property and sales tax matters. I frequently represent clients before the Internal Revenue Service and the Franchise Tax Board of California.

2. I graduated from University of California of San Diego in 1977 with a B.A. in Chemistry, and I received a M.A.T. in education from Northwestern University in 1978. I graduated from University of California, Berkeley School of Law (Boalt Hall) with a J.D. in 1981, and I

received an L.L.M. in taxation from New York University in 1983.

II. Initial representation of Gil Hyatt.

3. I first began representing Gil Hyatt in late 1991. At the time he retained me, Mr. Hyatt had moved to Nevada and sought my advice regarding tax planning and in regard to the preparation of both his 1991-tax-year California state income tax return (given his partial residency during 1991) and his 1991-tax-year federal income tax return.

4. I continued to provide Mr. Hyatt tax-planning advice on a periodic basis through mid-1993 when he was first notified by the FTB that it was auditing his 1991-tax-year California state income tax return. Thereafter, the scope of my representation of Mr. Hyatt increased to include representing Mr. Hyatt during the 1991 tax-year-audit. I subsequently represented Mr. Hyatt during the 1992-tax-year-audit. I currently represent him in regard to the long pending protests submitted by Mr. Hyatt in regard to the FTB's proposed assessment of taxes for each of the 1991 and 1992 tax-years. The FTB's audits, its proposed assessments and the protests are discussed in greater detail below.

III. There was full cooperation with the FTB auditors.

5. The 1991-tax-year audit ran from mid-1993 until early 1996, and the 1992-tax-year audit ran from late 1995 until late 1997. During the audits, I had frequent contact via telephone, written correspondence, and occasional in-person meetings with the three FTB auditors, Mark

Shayer, Felix Soriano, and Sheila Cox, who were successively assigned to the audits over the next three years. During this period, Mr. Hyatt – with my assistance and the assistance of his Nevada CPA Mike Kern – produced without objection the documents requested by the FTB auditors, all in a timely manner.

6. The production of documents and information to the FTB was enormous. Most of the 3,500 pages in the audit filed compiled by the FTB on Mr. Hyatt were documents produced by Mr. Hyatt.

7. At all times during the audits, Mr. Kern and I were cooperative and professional. To the contrary, I felt I developed an extremely good working relationship with each of the FTB auditors. At the outset of the audit, I had no reason to believe that the FTB would not act in a fair and reasonable manner. I therefore saw no reason to object to its seemingly never-ending demands for more and more information, nor to refuse to produce the information and documents requested – *so long as it agreed to keep the information and documents strictly confidential.*

IV. FTB false promises of confidentiality.

8. The productions of documents and information to the FTB were preceded by countless, and quite explicit, oral and written assurances from the FTB that the information Mr. Hyatt was submitting would be kept strictly confidential and not publicly disseminated. From the outset of the audits, I informed the FTB of Mr. Hyatt's need and desire to keep private and confidential the materials produced during the audits. The following is a chronology of the written and oral contacts that I have had with the FTB concerning Mr. Hyatt's desire for confidentiality and/or

privacy, and the FTB's agreements to keep Mr. Hyatt's materials confidential and private. It is based upon my recollection, correspondence with the FTB, and the audit files.

A. Agreements and assurances from FTB auditor Mark Shayer.

9. On September 13, 1993, I spoke with Mark Shayer, FTB auditor, regarding reviewing taxpayer documentation. I told him that Mr. Hyatt did not want his licensing agreements readily available to all FTB personnel. Mr. Shayer explained that FTB personnel was required to maintain the confidentiality of a taxpayer's records. *Mr. Shayer assured me that Mr. Hyatt's file would be maintained in a locked cabinet and that only the FTB personnel working on the case would have access to the file.* We set up an appointment for Mr. Shayer to review the file on September 23, 1993.

10. On September 29, 1993, Mr. Shayer came to my office to review the documents requested by the FTB, including the agreement between Mr. Hyatt and Philips. I told Mr. Shayer that because of the documents' confidential nature, I wanted him to make copies only of excerpts, as needed. I reiterated to Mr. Shayer the sensitive, confidential nature of the documentation. Mr. Shayer assured me that the confidentiality of the documents would be maintained.

B. The FTB, through Mr. Shayer, agreed to keep Mr. Hyatt's Las Vegas address confidential.

11. My November 1, 1993 letter[1] to Mr. Shayer responded to his October 18, 1993 letter[2] requesting information from Mr. Hyatt. In Mr. Shayer's October 18, 1993 letter, he asked for information regarding Mr. Hyatt's purchase of his home in Las Vegas. My November 1, 1993 letter noted, that in providing the escrow information, *the address of Mr. Hyatt's home had been deleted. This deletion was made on the basis of a previous discussion I had with Mr. Shayer regarding Mr. Hyatt's desire to keep his home address in Las Vegas private and confidential. Mr. Shayer agreed that the FTB would keep Mr. Hyatt's home address confidential* as all documents submitted by Mr. Hyatt to the FTB would be kept confidential.

C. Agreements and assurances from FTB auditor Felix Soriano.

12. On June 29, 1994, I spoke with Felix Soriano, the new FTB auditor, regarding furnishing additional contracts for his review. I told Mr. Soriano about the sensitive and confidential nature of Mr. Hyatt's contracts, and asked him to come to my office to review the contracts. He said that he would. We scheduled an appointment for July 5, 1994 (which was rescheduled to July 11, 1994).

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[1] *See* Exhibit 1 hereto.

[2] *See* Exhibit 2 hereto.

13. On July 11, 1994, Mr. Soriano came to my office to review the requested contracts. After his review, he identified for me the excerpts from the contracts he wanted copied. I gave those excerpts to him pursuant to a cover letter dated July 11, 1994.[3] That letter requested that he keep confidential the excerpts from the contracts he had requested. Mr. Soriano agreed that the FTB would keep the documents confidential.

D. Agreements and assurances from FTB auditor Sheila Cox.

14. On February 17, 1995, Ms. Sheila Cox, a new FTB auditor, called to schedule an appointment to review Mr. Hyatt's documents at my office. We scheduled the appointment for February 23, 1995. I asked her to make as few copies of the documents as possible as I was concerned for the privacy of Mr. Hyatt since the documents were confidential. Ms. Cox told me that she would need to make the copies as these cases often take a long time to resolve.

15. On February 23, 1995, Ms. Cox came to my office to review the documents. I told Ms. Cox that Mr. Hyatt was very concerned with his privacy and the confidentiality of his papers and requested that the FTB only make copies of those documents that it really had to have in its files. I told her that the documents were always available for review at my offices. I told Ms. Cox that Mr. Hyatt is very concerned for his privacy and tries to maintain a very low profile in Nevada. *Ms. Cox assured me that everyone in the FTB was subject to the security and disclosure policy of*

[3] *See* Exhibit 3 hereto.

the FTB, the violation of which would cause an FTB employee to lose his job or worse. Ms. Cox gave me a copy of the FTB's security and disclosure policy to assure me and Mr. Hyatt that the materials and information that Mr. Hyatt was furnishing to the FTB pursuant to the audit would be kept confidential.

16. The FTB's security and disclosure policy is set forth in its Security and Disclosure Manual. The Manual provides that the policy is in place to encourage taxpayers to make full disclosure on their income tax returns without fear that the information will be revealed for some other purpose. The failure of an employee of the FTB to ensure confidentiality of the data can subject the employee to criminal action, disciplinary proceedings and potential loss of employment.[4] *The information subject to confidentiality imposed by the Manual includes any item of information that is submitted to the FTB* to administer its program responsibilities that is not specifically made public information by statute, including California tax return information.

E. Mr. Hyatt and I relied on the FTB representations of confidentiality.

17. Mr. Hyatt and I relied upon the representations of the FTB auditors and the provisions contained in the Manual that the highly confidential information Mr. Hyatt was providing to the FTB pursuant to the auditors' request would be maintained confidential. Ms. Cox said that

[4] A copy of the excerpt from the FTB security and disclosure policy presented to me by Ms. Cox is attached hereto as Exhibit 4.

she needed copies of everything, which I then agreed to send. She also requested authorization to get bank account information.

18. Under my cover letter dated February 28, 1995,[5] I sent the requested copies of Mr. Hyatt's bank account statements and canceled checks to Ms. Cox. *My cover letter noted that*, as I discussed with all of the previous Franchise Tax Board auditors, *all of the correspondence and materials furnished to the Franchise Tax Board by Mr. Hyatt were highly confidential*. My cover letter also noted that it was our understanding that such materials were to be retained in locked facilities with limited access. Ms. Cox did not question this statement.

19. On March 1, 1995, Ms. Cox acknowledged in a letter our meeting on February 23, 1995.[6] In that letter she acknowledged that Mr. Kern expressed concern about the [sic] Mr. Hyatt's privacy. She confirmed that she gave me documentation regarding the FTB security and disclosure policy. She promised that all documents sent to her would be kept confidential.

F. The FTB reconfirmed Mr. Hyatt's desire for privacy and his desire to keep his Las Vegas address confidential.

20. In my letter to Ms. Cox dated August 29, 1995,[7] I pointed out that the audit report issued by the FTB was

[5] *See* Exhibit 5 hereto.

[6] *See* Exhibit 6 hereto.

[7] *See* Exhibit 7 hereto.

misdirected because it mixed up Mr. Hyatt's residency with his concern over his privacy. My August 29, 1995 letter reconfirmed that Mr. Hyatt had been careful to protect his privacy as a result of past harassment and disruption of his work, but that his efforts to protect his privacy did not affect his residency. My August 29, 1995 letter further reminded the FTB that it had been informed since the outset of the audit that Mr. Hyatt was concerned with his privacy. My letter reiterated that, like many successful individuals, Mr. Hyatt put significant effort in protecting his privacy. My letter denied that Mr. Hyatt was concerned about kidnapping. My letter went on to note that, as part of maintaining his low profile, Mr. Hyatt asked fiends [sic] and colleagues to serve as trustees or open accounts with utility companies for Mr. Hyatt's personal residence; Mr. Hyatt also used P.O. boxes for his correspondence to maintain privacy. *My letter reconfirmed that Mr. Hyatt did not want his name publicly associated with his residence as he was trying to protect himself from undesirable contacts and had tried to insulate his name from readily accessible public records.* The letter expressed concern that the promises of confidentiality by the FTB had been compromised, because of the FTB audit report's failure to consider certain information provided by Mr. Hyatt to the FTB during the course of the audit and because of the duplicative requests made by the FTB for information during the course of the audit.

21. In the FTB's August 31, 1995 response[8] to my letters of August 29 and 30, 1995, *the FTB acknowledged*

[8] *See* Exhibit 8 hereto.

that Mr. Hyatt was a private person who put a significant effort into protecting his privacy and further acknowledged that the taxpayer did not want his name publicly associated with his residence, as was previously acknowledged by Mr. Shayer and Mr. Soriano.

G. Mr. Hyatt's frugal and unassuming lifestyle was explained to the FTB.

22. In my September 22, 1995 letter[9] to the FTB in response to its August 31, 1995 letter, I stated that the FTB dwelled on Mr. Hyatt's private nature, expressing its disbelief that an individual concerned about privacy would live in the modest home in which Mr. Hyatt lived. My letter doubted that the FTB was aware of the methods which successfully increased one's privacy. My letter noted that Mr. Hyatt's privacy had been successfully maintained because of his modest life style and because of his low profile; neither his home nor his apartment attracted the scrutiny of curious public or of his intrusive family (unlike high walls and gates which are noticeable and invite the curious).

23. In the FTB's September 26, 1995 letter to me,[10] the FTB acknowledged that Mr. Hyatt's belief that his modest life style and low profile helped him to maintain his privacy. The FTB letter notes that the FTB is aware of the methods which successfully increase one's privacy. The FTB's letter also acknowledged the taxpayer's desire to keep a low profile and to keep uninvited visitors out.

[9] *See* Exhibit 9 hereto.

[10] *See* Exhibit 10 hereto.

H. Mr. Hyatt's desire for privacy and desire to keep the address of his Las Vegas home confidential was reiterated to the FTB.

24. In my cover fax dated October 13, 1994 to Ms. Sheila Cox[11] where I transmitted our response letter to the FTB's letter of September 26, 1995, I noted that, because of the taxpayer's desire for privacy, I would be delivering the original letter with the underlying documentation personally to Ms. Cox.

25. In my October 18, 1995 letter to the FTB[12] responding to the FTB's August 2, 1995 penalty letter, I noted that our August 29, 1995 letter to the FTB *addressed Mr. Hyatt's desire to keep his name and address out of the public records* so that the harassment that he encountered in California would not follow him to Nevada.

I. In sum – the FTB was continually reminded of Mr. Hyatt's desire for privacy and confidentiality, and the FTB repeatedly promised to keep Mr. Hyatt's materials confidential.

26. I repeatedly expressed to the FTB Mr. Hyatt [sic] concerns over whether the FTB would maintain the taxpayer's records confidential and would conduct the audit in a professional manner. I relayed these concerns to the three auditors involved on Mr. Hyatt's audit, all of whom assured me that the materials furnished by Mr. Hyatt would be maintained confidentially and that Mr. Hyatt's desires were being respected. In the various

[11] *See* Exhibit 11 hereto.

[12] *See* Exhibit 12 hereto.

correspondence and the various contacts noted above, I continually reminded the FTB of the need for confidentially. [sic] Indeed, FTB protest officer Anna Jovanovich expressed acute awareness of Mr. Hyatt's concern for confidentiality – she went so far as to call Mr. Hyatt "paranoid." On another occasion she acknowledged in a letter Mr. Hyatt's concern for confidentiality.[13]

V. The FTB's standard for determination of residency and its application to Hyatt.

27. Based on the documents submitted by Mr. Hyatt and the audit file in whole, and applying the FTB's standard for determining residency, I saw no basis on which the FTB could conclude Mr. Hyatt was a California resident for the two periods in dispute – September 26 to December 31, 1991 and January 1 to April 2, 1992. In short, the FTB's own test for determining the date on which an individual is no longer a resident of California is two pronged: (i) physical presence by the individual in another state, and (ii) the intent by that individual to remain in that state. (California Revenue & Taxation Code § 17014; *Whittell v. FTB*, 231 Cal. App. 2d 279, 284, 41 Cal. Rptr. 673 (1964)).

28. The documents and information submitted to the FTB auditors demonstrated both: (i) Mr. Hyatt's physical presence in Nevada during most of the two disputed periods – except for short business trips that were well documented, and (ii) Mr. Hyatt's intent to remain in Nevada. My protest letter to the FTB dated June 20, 1996

[13] *See* Exhibit 13 hereto.

describes the information and documents presented to the FTB and best summarizes the strength of Mr. Hyatt's residency case as it demonstrates Mr. Hyatt's physical presence in Nevada during the disputed period and his intent to remain.[14] Of course, the best evidence of Mr. Hyatt's intent in September of 1991 to remain in Nevada, is the fact he has continued to live in Nevada since that time.

VI. The FTB's proposed assessment for the 1991-tax-year and its public dissemination by the FTB.

29. I was therefore disappointed when we received the FTB's "findings" in regard to the audit. A summary of these findings were sent by FTB auditor Sheila Cox in a letter dated August 2, 1995.[15] The FTB later issued a formal Notice of Proposed Assessment, dated April 23, 1996, against Mr. Hyatt for the 1991-tax-year.[16] This was almost three years after Mr. Hyatt received notice of the audit. The proposed assessment sought taxes totaling *$4,540,404.77*. I was even more disappointed when I learned that the FTB proposed to assess Mr. Hyatt not only income tax on his earnings for the period after his move to Nevada – September 21, 1991 through the end of 1991 – but was also proposing to assert a "fraud" penalty against Mr. Hyatt thereby increasing the assessment by 75% and seeking interest on both the tax and penalty from

[14] *See* Exhibit 14 hereto.

[15] *See* Exhibit 15 hereto.

[16] *See* Exhibit 16 hereto.

1991. As a result, the proposed assessment was equal to almost double the amount of tax that the FTB claimed was owned for the 1991-tax-year.

30. Despite the promises and assurances by the FTB of confidentiality, as the 1991-tax-year audit concluded, there were signs that the FTB was not keeping its promises. In my April 30, 1996 letter to the FTB, on which Ms. Cox was copied, I reminded the FTB of Mr. Hyatt's continuing requests regarding confidentiality and then chastised the FTB for its dissemination of the Notice of Proposed Assessment to an address Mr. Hyatt had not used for four years.[17] The FTB knew Mr. Hyatt [sic] current mailing address from the voluminous correspondence during the audit. Mr. Hyatt and I were therefore quite upset that the FTB choose [sic] one of the most confidential and potentially embarrassing documents to send to an address that it had not sent correspondence [sic] for years. The Notice asserted that Mr. Hyatt owed millions of dollars in taxes and penalties, and it apparently fell into the hands of a third party. I informed the FTB: "This is a breach of the confidential relationship that the FTB promised to maintain in handling this matter." Only after the FTB's production of its 1991-tax-year audit file did Mr. Hyatt begin to learn he [sic] full extent of the FTB's broken promises.

VII. Protest of 1991-tax-year assessment.

31. To preserve Mr. Hyatt's rights under California law (Cal. Rev. & Tax Code § 19044), I gave the FTB formal written notice on June 20, 1996, a lengthy and detailed

[17] *See* Exhibit 17 hereto.

protest letter.[18] As mentioned above, the protest letter notified the FTB of the significant evidentiary support contrary to the conclusion it reached in the audit. The protest letter also set forth in detail the reasons that Mr. Hyatt disputed the proposed assessment.

32. Once a protest letter is sent to the FTB, the matter then enters what is called the "protest" stage, during which the FTB assigns an in-house attorney to act as the Protest Officer, who in theory makes an independent review of the audit and a final determination concerning the proposed assessment before submitting a final assessment. The FTB emphasizes to taxpayers and their representatives that the protest officer conducts an independent review. As set forth in further detail below, Mr. Hyatt's protest is still pending, almost four years after his protest letter was submitted, almost seven years after he first received notice that he was being audited, and almost nine years after the tax year in question.

FTB audit and assessment for the 1992-tax-year and the FTB's multi-million dollar error.

33. Shortly after the FTB notified Mr. Hyatt of the results of the 1991-tax-year audit, the FTB informed Mr. Hyatt, through a letter sent to me dated January 19, 1996[19] that it was commencing an audit of Mr. Hyatt for the 1992-tax-year based on the results of its audit for the 1991-tax-year – even though Mr. Hyatt never resided in

[18] *See* Exhibit 14 hereto.

[19] *See* Exhibit 18 hereto.

California during 1992 and in April of 1992 had purchased his home in Las Vegas and moved into that home from his Las Vegas apartment.

34. The FTB later issued a formal Notice of Proposed Assessment, dated August 14, 1997, against Mr. Hyatt for the 1992-tax-year.[20] The proposed assessment for 1992 sought taxes totaling $5,669,021.00 and as well as a "fraud" penalty thereby increasing the assessment by 75%, and sought interest on both the tax and penalty from 1992. The total proposed assessment therefore for the 1992 tax year equaled $14,115,941.00. I timely submitted a "Protest" letter to the FTB on October 10, 1997 in regard to the FTB's proposed assessment for the 1992-tax-year.[21] The Protest for the 1992-tax-year is still pending.

35. The proposed assessment for 1992-tax-year contained an income error that caused the proposed assessment to overstate Mr. Hyatt's income by $24,000,000. In short, the FTB concluded that Mr. Hyatt was a resident of California through April 2, 1992, when he closed escrow on his Las Vegas home.[22] But the proposed assessment for the 1992-tax-year mistakenly assessed Mr. Hyatt for the income he earned during the month of December 1992.

36. I informed the FTB of this income mistake in a letter dated July 17, 1997 fully expecting that it would correct the mistake and issue an amended proposed assessment for the 1992-tax-year, but the FTB has failed

[20] *See* Exhibit 19 hereto.

[21] *See* Exhibit 20 hereto.

[22] *See* Exhibit 19 hereto.

to do so.[23] I made other attempts to have the FTB correct this income mistake,[24] but to this date the FTB is continuing to assess Mr. Hyatt for the December 1992 income, despite its own findings that he was not a resident of California at that time.

IX. Receipt of 3,500 page audit file and discovery therein of the FTB's audit conduct.

37. The FTB audit process is as secretive as a grand jury. The FTB takes the position that the individual subject to the audit has no right to review or receive a copy of the audit file until after the FTB has made its proposed assessment. I did request a copy of the audit file on May 1, 1996,[25] which was within a week after the FTB issued the proposed assessment for the 1991-tax-year. The audit file was not produced until October of 1996, which was well after the time I had submitted Mr. Hyatt's protest letter for the 1991-tax-year.

X. Settlement threats from the FTB's first protest officer.

38. The initial protest officer assigned to Mr. Hyatt's protest for the 1991-tax-year was Anna Jovanovich. I was informed that Ms. Jovanovich was the protest officer in a letter dated April 24, 1997 from Terry Collins.[26] From the

[23] *See* Exhibit 21 hereto.

[24] *See* Exhibit 20 hereto.

[25] *See* Exhibit 22 hereto.

[26] *See* Exhibit 23 hereto.

commencement of the protest in 1996, I have periodically spoken with or corresponded with each of the three successive protest officers, Ms. Jovanovich, Robert Dunn, and Charlene Woodward, to determine the status of the proceedings and inquire about time frame for resolution. In that regard, in June of 1997 I had lengthy conversation with Ms. Jovanovich wherein I inquired as to a time frame for resolution and again emphasized the strength of Mr. Hyatt's case given the documentary evidence submitted supporting his Nevada residency starting in September of 1991. During the discussion, without any prompting from me, she raised the issue of compromise and settlement. She first stated that she understood Mr. Hyatt to be very sensitive – she used the word paranoid – about his privacy and about his desire to keep the information submitted to the FTB confidential. She informed me that in high profile audits [sic] large dollar audits it was necessary for the FTB to engage in fact intensive, in depth investigations and inquire into many *unrelated* facts and questions. She emphasized that she would be sending me a lengthy letter asking for more documents and information.

39. Ms. Jovanovich informed me during this lengthy conversation that at this stage of the proceedings (*i.e.* the protest) most individuals, particularly wealthy or famous individuals, compromise and settle with the FTB to avoid publicity, to avoid the individual's financial information becoming public, and to avoid the very fact of the dispute with the FTB becoming public. The clear import of her suggestion was that famous, wealthy individuals settle with the FTB to avoid being, rightly or wrongly, branded a "tax dodger." I understood Ms. Jovanovich to be suggesting that Mr. Hyatt enter into settlement discussions with the FTB concerning a compromise over the assessment of

taxes, penalties, and interest being assessed by the FTB. I relayed Ms. Jovanovich's statements to Mr. Hyatt.

40. At the time Ms. Jovanovich made the statements to me about settlement and avoiding disclosure of financial information and adverse publicity, we had already produced thousands of pages of information regarding Mr. Hyatt, his licensing business, and his financial position. She stated she would soon be making additional requests in a lengthy letter.

41. In August of 1997, approximately two months after my conversation with Ms. Jovanovich, the FTB sent its Notice of Proposed Assessment for the 1992 tax year. As explained above, it assessed not only penalties and interest, but contained mistake [sic] based upon the FTB's own admitted findings by including income from after the disputed periods. The FTB nonetheless assessed Mr. Hyatt taxes on his income through most of 1992, and assessed a fraud penalty for income earned both before and after April 4, 1992. The FTB's refusal to correct the mistake along with Ms. Jovanovich's suggestions concerning entering into a compromise with the FTB, call into question whether the mistake was innocent in nature, or intended by the FTB as another bargaining chip for negotiations and compromise.

XI. Commencement of this case.

42. Mr. Hyatt filed this litigation in January 1998, shortly after the 1992-tax-year-assessment. My only involvement has been as a potential witness. While the case has been pending, I have continued to represent Mr. Hyatt in the protests that are before the FTB for both the 1991 and 1992-tax-years. At no time have any of the three

successive protest officers assigned by the FTB informed me that the protest was being delayed, hindered, or in any way affected by this case.

XII. The Nevada litigation does not interfere with the protests.

A. Continuation of the protest.

43. I continued communicating with Ms. Jovanovich concerning the protest through early 1998 shortly after this litigation started. I received no further communications from the FTB concerning the protest until I received a letter dated October 27, 1998,[27] from Robert W. Dunn, stating that because of Ms. Jovanovich's retirement, he had been assigned to resolve Mr. Hyatt's protest for 1991-1992 tax-years. Mr. Dunn's letter stated that as soon as he was done with the initial review of my protest letters as well as the entire audit file and the documents we had submitted to Ms. Jovanovich, he would contact me. At no point in his letter did Mr. Dunn inform me that the protest was being delayed, stopped, interfered with, or hindered by the litigation in Nevada.

44. My next written communication from the FTB was a letter dated February 24, 1999 stating that Mr. Hyatt's protest for 1991 and 1992-tax-years had been reassigned to Charlene Woodward.[28] The letter stated that [sic] soon as Ms. Woodward completes her review of the file, she would contact me. The letter in no way indicates that

[27] *See* Exhibit 24 hereto.

[28] *See* Exhibit 25 hereto.

Mr. Hyatt's Protest was being delayed, stopped, or in any way interfered with or hindered by the Nevada litigation.

B. Isolation of protest officer from the FTB litigation team.

45. On or about March 2, 1999 I spoke by telephone to Ms. Woodward. Ms. Woodward provided me with some background concerning her work experience and her tenure with the FTB. She informed me that her instructions were to work on the matter and to analyze it independent from "everything else going on", which I understood to mean the Nevada litigation. She further told me that a "Chinese" law (what I understood to be an "ethical wall") was being constructed around her because FTB personnel working on the Nevada litigation were not to discuss the case with her. She told me that Mr. Dunn was no longer handling the protest because he was assisting in the Nevada litigation.

46. At no point did Ms. Woodward indicate to me that the protest or her work on the Protest was in anyway being delayed, stopped, interfered with, or hindered by the Nevada litigation. To the contrary, my understanding based on with [sic] Ms. Woodward's comments was that the Protest was proceeding on its own course independent of and irrespective of the Nevada litigation.

C. FTB recommencement of protest after Nevada court ruling.

47. On or about July 19, 1999 I placed a call to Ms. Woodward to inquire as to the status of the Protest. My call was returned by Terry Collins, whom I understood to be Ms. Woodward's supervisor at the FTB. Mr. Collins

wanted me to know that Ms. Woodward had been assigned to the protest and would soon start working on the Protest. I told Mr. Collins that I understood that Ms. Woodward had already been assigned to the case. Mr. Collins explained to me that at the outset of the Nevada litigation it appeared possible that the Nevada court would consider the residency matter and make a determination. As a result, Mr. Collins explained that the FTB did not devote resources to handling the Protest. In other words, I understood him to be saying that if the matter was going to be decided by a Nevada court, the FTB made a decision not to devote time and resources to working on Mr. Hyatt's Protest. I was surprised to hear this because it was contrary to my prior conversations and correspondence with the FTB at the commencement of the Protest and more recently wherein the FTB Protest officers – Ms. Jovanovich, Mr. Dunn, and Ms. Woodward – all gave me the distinct impression that the Protest was proceeding and would be resolved quickly.

48. Mr. Collins further explained to me during our July 19, 1999 telephone call that because it appeared that the Nevada court would not be considering the residency issue (i.e. the court had dismissed the declaratory relief claim), the FTB would again commence the Protest. He said I could expect a letter from Ms. Woodward that week confirming that she would begin her analysis. He informed me that afterwards it would take Ms. Woodward less than six months to respond. When I asked him if he thought I would hear from her within a couple of months, he thought it would be even less time. He also indicated that he had been meaning to call me to inform me that the FTB would start working on Mr. Hyatt's protest again. My letter of

July 23, 1999 letter [sic] to Mr. Collins confirms the substance of our conversation on or about July 19, 1999.[29]

XIII. FTB failure to follow its own internal policy for processing the protest.

49. On or about September 14, 1999, I called and spoke with Ms. Woodward to discuss FTB's Notice 99-1. This is a FTB internal document that sets forth the guidelines for processing the protest. It states that protests are typically to be handled within six months. Ms. Woodward informed me that she was not familiar with such [sic] form, but that she would check with others at the FTB. I then inquired as to how her work on the protest was progressing. She informed me that she had the protest for only one month and had just finished reviewing the file for the first time. She informed me that she had a number of questions six-nine [sic] (69) to be precise, that she had hoped to answer by re-reviewing the audit file. She did not know how long that would take, and that this was only the second protest she had ever been assigned. I eventually concluded the conversation by again asking Ms. Woodward to determine if a plan was in place within the FTB consistent with the FTB Notice 99-1 to resolve the protest within six months. After my telephone call, I faxed her a copy of the FTB Notice 99-1.[30]

50. On September 15, 1999, the day after my telephone conversation with Ms. Woodward, her supervisor Terry Collins called me. He asked me what I was seeking

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[29] *See* Exhibit 26 hereto.

[30] *See* Exhibit 27 hereto.

with respect to FTB Notice 99-1. I informed him that I was attempting to determine whether or not the FTB would be following the guidelines set forth in FTB Notice 99-1 in regard to Mr. Hyatt's protest. He informed me that FTB Notice 99-1 set forth guidelines, not rules. He further informed me that given the nature of the case, the guidelines would not be followed in regard to Mr. Hyatt's Protest because he thought the FTB's Chief Counsel would give permission to not follow the guidelines in this case. He then asked me what "I really wanted from the FTB." I informed him that I was trying to determine the expected time of receiving a response from Ms. Woodward in regard to the Protest. He concluded by stating that there could be no date proposed for anticipating completion. Again, there was no reference that Protest was being delayed, stopped, interfered with, or hindered by the Nevada litigation.

51. I confirmed my September 14, 1999, conversation with Ms. Woodward in a letter dated September 23, 1999.[31] I confirmed my September 15, 1999, conversation with Mr. Collins in a letter also dated September 23, 1999.[32]

XIV. FTB requests further information from Hyatt in the protest and finally sets hearing date for protest.

52. Having heard nothing further from the FTB for three months, on December 14, 1999, I sent Ms. Woodward two separate letters, one inquiring as to the status of Mr. Hyatt's Protest for the 1991 tax-year and the second one

[31] *See* Exhibit 28 hereto.

[32] *See* Exhibit 29 hereto.

inquiring as to the status of Mr. Hyatt's Protest for the 1992 tax-year.[33] The next contact I received from the FTB was a letter from Ms. Woodward dated December 30, 1999, that was 31 pages in length and sought answers to over 187 questions.[34] Ms. Woodward gave me sixty days to respond to her letter, a letter that had been in the works by her and prior FTB protest officers for over three years. Ms. Woodward's letter stated that she hoped to have a hearing on the Protest this June or July.[35] I understand this to be the lengthy letter Ms. Jovanovich alluded to approximately two and half years earlier.

53. On March 15, 2000 I again spoke with Ms. Woodward. She agreed that Mr. Hyatt could have a 90 day extension to answer the 187 questions she posed in her December 30, 1999 letter, so long as we mutually agree [sic] on a hearing date. She then stated that a hearing in the protest would be held in September or October of this year. She emphasized that the FTB intended to, and would, conduct the hearing and have the protests complete by early this Fall.

XV. The FTB auditor issued a perjured subpoena to try and acquire information about Mr. Hyatt.

54. In May of 1998 I received correspondence from Sheila Cox attached to which was a subpoena she had issued on the FTB's behalf to CalFedBank. The proof of

[33] *See* Exhibit 30 hereto.

[34] *See* Exhibit 31 hereto.

[35] *See* Exhibit 31 hereto.

service attached to the subpoena sworn under oath that I had been personally served with the subpoena on May 28, 1998.[36] The proof of service was wrong because I was not served personally that day or any other. The subpoena also violated the California Financial Information Privacy Act that requires the consumer (here Mr. Hyatt) be served notice of the subpoena ten days prior to the due date of the subpoena. The due date on the subpoena was May 28, 1998, the same day it falsely states I was personally served.

55. On June 3, 1998 I spoke with Ms. Cox who confirmed that the subpoena was served on the bank prior to the ten day waiting period. She said that the FTB often does this because the banks take so long to respond.

56. Ms. Cox also informed me that the FTB had subpoenaed Cal Fed because Ms. Jovanovich, the protest officer, thought that a number on a document Mr. Hyatt produced was a secret bank account number. It was actually a bank branch number. In other words, Ms. Jovanovich mistakenly thought it was a secret bank account that Mr. Hyatt was hiding. She therefore instructed Ms. Cox to subpoena the records directly from the bank. To Mr. Hyatt's great embarrassment, the subpoena was served on the bank and falsely stated that Mr. Hyatt had provided incomplete information during the FTB's investigation of him.

57. Not only was this not true, but by not giving Mr. Hyatt the required ten day notice he was unable to correct

[36] *See* Exhibit 32 hereto.

the FTB's mistake prior to its embarrassing and false representation to the bank. If the FTB had called me first to request the "secret" account information, the matter would have been clarified without the FTB making false statements about Mr. Hyatt and without invading his privacy.

Further your affidavit sayeth naught.

DATED this 20th day of March, 2000.

/s/ Eugene G. Cowan
EUGENE G. COWAN

SUBSCRIBED and SWORN to before me
this 20th day of March, 2000.

/s/Mary E. Mc Dermott
NOTARY PUBLIC

[SEAL]
MARY E. MC DERMOTT
Commission #1166658
Notary Public – California
Los Angeles County
My Comm. Expires Jan 16, 2002

CONFIDENTIAL H 01543

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RICHARD J. RJORDAN
(RETIRED)

FILE NO.
08-160-002

February 28, 1995

BUR MAR 01 1995 REC'D

Ms. Sheila Cox
Tax Auditor
Franchise Tax Board
333 N. Glenoaks Boulevard
Suite 200
Burbank, California 91502-1170

Re: Gilbert P. Hyatt – 1991 Taxable Year

Dear Ms. Cox:

Per your request, enclosed are copies of the taxpayer's bank account statements and cancelled checks for the Nevada bank accounts he maintained in 1991 and 1992. As previously discussed with you and other Franchise Tax Board auditors, all correspondence and materials furnished to the Franchise Tax Board by the taxpayer are highly confidential. It is our understanding that you will retain these materials in locked facilities with limited access.

We appreciate your understanding and cooperation.

Sincerely,

/s/ Eugene G. Cowan
Eugene G. Cowan
of RIORDAN & McKINZIE

EGC:pmc

Enclosures

CONFIDENTIAL H 01531

STATE OF CALIFORNIA [SEAL]

FRANCHISE TAX BOARD
333 N. GLENOAKS BLVD. SUITE 200
BURBANK, CA 91502-1170
TELEPHONE: (818) 556-2942
3/1/95
Mr. Michael W. Kern CPA
c/o Piercy, Bowler, Taylor, & Kern
6100 Elton Ave. #1000
Las Vegas, Nevada 89107

Re: Gilbert P. Hyatt
1991

Dear Mr. Kern:

Based upon my meeting with Mr. Eugene Cowan at his office last week, I am submitting the following revised list as a document request for items needed to complete the audit. You had indicated your concern about the taxpayer's privacy. I have given Mr. Cowan documentation regarding the FTB Security and Disclosure Policy. I can assure you that all documents sent to me will be kept private.

I had indicated to Mr. Cowan that I will need copies of all of the bank information which I examined at his office on February 23, 1995. He said that he would send copies of these documents to me. I had also indicated that I would need to request the other bank information for the California bank accounts. In order to do this, I will need signed authorization from the taxpayer. Mr. Cowan had indicated that the taxpayer would be willing to do so. I have enclosed the FTB Form 2590 for each entity. Please have the taxpayer sign each form and send these back to me by March 20, 1995.

Some of the information obtained at the meeting was not complete, so I will have to request information such as account numbers, etc. I have indicated on the next page where such additional information is needed.

[LOGO]
Z 739 601 109
Receipt for
Certified Mail
No Insurance Coverage Provided
Do not use for International Mail
(See Reverse)

Sent to
c/o Piercy, Bowler, Taylor
Michael W. Kern CPA

Street and No.
6100 Elton Way #1000

P.O., State and ZIP Code
Las Vegas NV 89107

Postage $

Certified Fee

Special Delivery Fee

Restricted Delivery Fee

Return Receipt Showing to Whom & Date Delivered

Return Receipt Showing to whom, Date, and Addressee's Address

TOTAL Postage & Fees $

Postmark or Date 3/1/95 Cox

PS Form 3800, March 1993

CONFIDENTIAL H 01533

CREDIT CARD INFORMATION

4. I will need the taxpayer to request the statements from the credit card companies himself. I have called the credit card companies, and they do not provide third party information. I believe that the cost of obtaining the statements, if any, is minimal. I will need the statements for all of 1991 and all of 1992. The following account statements are needed:

Credit Card Accounts:

Household
4317-3410-1024-2499

Household
5418-2961-4100-6386

Household
5414-7410-1018-2135

Chase
4226-563-134-706

Bank of New York
5417-4000-4552-7056

MBNA
5329-0312-5816-5925

TELEPHONE INFORMATION

Regarding the telephone information, I will investigate to determine how long each company retains the billing statements. At a later date, I may decide to request authorization from the taxpayer to determine dates that the service was established, etc.

Thank you for your cooperation in this matter.

If you have any questions, please feel free to call.

Sheila Cox
Tax Auditor

cc: Eugene Cowan

DISTRICT COURT
CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA; and DOES 1-100, inclusive, Defendants.	)	Case No. A382999

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JUDGE SIATTA

Taken on Friday, April 21st, 2000
At 9:10 o'clock a.m.
Las Vegas, Nevada

Reported by: Carre Lewis, CCR 497

* * *

[41] trying to assess, we think, fraudulently, we think without proper motive or proper basis, a procedure whereby we would have my client give up millions of dollars in his money to the State of California. That's a business. That's a commercial transaction, I think, for the purposes of the negligent misrepresentation claim.

MR. WILSON: Your Honor, may I put a question?

THE COURT: Certainly.

MR. WILSON: For the record, my name is Thomas Wilson. I'm counsel for Franchise Tax Board.

THE COURT: Welcome.

MR. WILSON: George Takenouchi is also present with me.

THE COURT: Welcome.

MR. WILSON: And also present is Robert Dunn who is counsel of the department itself. I have a question with respect to the scope of this case. And Mr. Bourke made a comment about injuries which occurred here which the parties wish to litigate. I have a question for the Court. And that is, does the Court see this case as being limited to actions which occurred within Nevada? The court raised a basic threshold question here which is the extent of the privilege. Is it limited or is it absolute when we talk about sovereign immunity, whether it's absolute or whether it's limited. And I understand the question which the court [42] puts. Are we talking about actions limited to those which occurred in the state of Nevada or are we talking about trying the entire audit in California as well?

Now there are procedures for the trial and the resolution of a claim of tortious actions which occurred within the state of California. But we have a very basic question here which I believe there is some degree of confusion. And that is, are we litigating what occurred in Nevada or are we trying the entire audit, whether in California or Nevada? It makes a vast difference in the scope of this case. It makes a vast difference in the scope of the discovery and certainly the duration of the case. That would be helpful to us, I think, if we have a common understanding of that.

THE COURT: I think that's a fair question. And while I wish that I could give you a simple blackline answer, to suggest to you that I wish to revisit or otherwise litigate

the entire audit would be an incorrect statement. That, in its entirety, is not the subject matter of this lawsuit, frankly.

On the other hand, to limit the environment of this lawsuit merely to acts which occurred in Nevada would be to narrow it far too technically. I believe that acts that could occur in any number of places, not limited to Nevada, certainly not limited to the state of California, [43] but that none the less would affect the plaintiff here in the state of Nevada. So to give you a limitation with respect to only those acts that occurred in Nevada, I can give you an unequivocal no. We are not limiting it to that extent.

On the other hand, however, I can assure you that I have no desire, nor do I think that this lawsuit frames the complaint in such a manner that would cause us to revisit the entire audit that gives rise to this lawsuit. And I don't know that that's as helpful as you perhaps had hoped it might be.

MR. WILSON: Maybe this is a work in progress, Your Honor.

THE COURT: Oh, I think it is.

MR. WILSON: And I think it's one that we probably need to define. In fairness to the court, it's going to be more difficult for you than it is for we. Because we are involved in the case and you see it from time to time. But for, I suppose, an effective trial of this case, if it gets that far, if it is not limited or disposed of on motion, I guess we are going to have do [sic] reach a point where the Court and we understand the limits of the factual issues and the limits of the legal issues which

are going to be reserved for trial if indeed the court decides it wants to try this case and we don't dispose of it on motion.

* * *

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GILBERT P. HYATT

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA; and DOES 1-100, inclusive Defendant.	) Case No. A382999) Dept No. XVIII) Dckt No. F)) **ORDER**)) (Filed May 31, 2000)

Defendant's motion for summary judgment under Nev. R. Civ. P. 56(b), or alternatively for dismissal under Nev. R. Civ. P. 12(h)(3), having come before the Court, the plaintiff being represented by Thomas L.

Steffen, Esq., Mark A. Hutchison, Esq., Donald J. Kula, Esq., and Thomas K. Bourke, Esq., and the defendant being represented by Thomas R. Wilson, II, Esq., Thomas Heller, Esq., and George Takenouchi, Esq., the Court having considered all of the papers filed by the parties and argument of counsel, and GOOD CAUSE APPEARING;

IT IS HEREBY ORDERED that defendant's motion for summary judgment under Nev. R. Civ. P. 56(b), or alternatively for dismissal under Nev. R. Civ. P. 12(h)(3), is denied.

ORDER

IT IS SO ORDERED.

DATED this 31 day of May, 2000.

/s/ Nancy M. Saitta
DISTRICT COURT JUDGE
NANCY M. SAITTA

SUBMITTED BY:

/s/ Thomas L. Steffen, Esq.
Mark A. Hutchison, Esq.
HUTCHISON & STEFFEN
Lakes Business Park
8831 West Sahara Avenue
Las Vegas, Nevada 89117

Attorneys for Plaintiff

APPROVED AS TO FORM BY:

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DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA; and DOES 1-100, inclusive, Defendant.	) Case No. A382999) Dept No. XVIII)) **NOTICE OF ENTRY OF ORDER**

TO: ALL INTERESTED PARTIES

NOTICE IS HEREBY GIVEN that on May 31, 2000, an Order was entered in this case, a copy of which is attached hereto.

DATED this 1st day of June, 2000.

HUTCHISON & STEFFEN

By: /s/ Mark A. Hutchison
Thomas L. Steffen, Esq.
Mark A. Hutchison, Esq.
Lakes Business Park
8831 West Sahara Avenue
Las Vegas, Nevada 89117

Attorneys for Plaintiff

[Certificate of Service Omitted In Printing]

CERTIFIED COPY

BEFORE THE

SUPREME COURT OF NEVADA

FRANCHISE TAX BOARD OF CALIFORNIA, Plaintiff, v. DISTRICT COURT, Defendant.	)	RECEIVED MAR 19 2001 No. 35549/36390

TRANSCRIPT OF PROCEEDINGS

Friday, February 9, 2001

* * *

[12] deposition just for her going over this case brick by brick.

THE COURT: But I thought the only issue was the residency.

MS. WILSON: The only issue was the residency.

THE COURT: That's according to your client's –

MR. WILSON: Well, imaginative lawyers can think of a lot of questions to ask, and a lot of questions about FTB policy and practice and procedure and how you reach judgments and all of this sort of thing in an attempt to make a case.

16,000 documents have been produced in this case as a result of the discovery master's ruling of its ratification by the district court judge. 16,000. We're litigating the

audit. We're not litigating a willful tort or something that happened outside the scope of employment of governmental duty. We're litigating the audit.

There's a substantial question here as to whether or not a sister state's court in these circumstances has subject matter jurisdiction [13] to hear and try this case and reach a judgment with respect to the performance of the sovereign activity.

Now, there's – the ruling of the district court discovery master were that the entire audit is at issue, not just what happened in Nevada. The entire audit, the 97 percent of the activity in California.

I do want to reserve a couple of minutes before my friends of the opposition speak, and so I'll sit down. Thank you.

THE COURT: Mr. Wilson, you may respond.

MR. BURNHART: Thank you. And good morning, Mr. Chief Justice, members of the court. My name is Peter Burnhart, and I represent the real party in interest, Gilbert P. Hyatt.

I'd like to focus the Court on three very well-established principles of law which I think will control the decision in this case.

First, Nevada – in fact, all states have a legitimate interest in providing their residents with redress for wrongful conduct of others. Very simple proposition; whether that wrongful conduct is committed by a private

* * *

[17] torts. We're not talking about negligence, I agree. We're talking about intentional torts which this state traditional [sic] has said are not immune when government agents commit intentional torts.

THE COURT: Mr. Burnhart, could you just in everyday, ordinary language tell me what those intentional torts are.

MR. BURNHART: Sure.

THE COURT: Written petition, we don't have (inaudible).

MR. BURNHART: I understand. And, again, I think that's a good point. That, in essence, what we're saying is that the FTB improperly disclosed private, confidential information to Hyatt after pledging to respect that confidentiality.

All of those acts were directed into the State of Nevada. And Mr. Wilson talks about 97 percent being in the State of California. Menecke is a good example of a case where the State of Wisconsin injected itself into the State of Nevada by sending the parolee here.

That's exactly what we're talking about here. The State of California through all of [18] its activities injected itself into the State of Nevada invading Mr. Hyatt's privacy.

THE COURT: Where did the alleged violation of privacy occur, in Nevada or California?

MR. BURNHART: It took place in both places.

THE COURT: (Inaudible) in California or –

MR. BURNHART: No. No. We're only saying that we're suing for the wrongful acts or the improper acts of the State of California. And we believe that all of the actions that California took was [sic] directed at a Nevada resident in the State of Nevada. And you can't simply put up a border around the state and say, you can't – or you can commit wrongs in another state but have an effect in Nevada without having to answer for that.

There are a couple of cases that we've cited in the brief. Menecke is a good example. Wisconsin acted in Wisconsin, but when the parolee assaulted the (inaudible) child in Reno, that action took place in Nevada. But the action that caused it took place in the [19] State of Wisconsin entirely.

You have Burnhart vs. Harrah's Club. It's a California case, but Harrah's Club was protected in Nevada by a – the absence of a (inaudible). California had no trouble saying that even though all Harrah's did was serve liquor in the State of Nevada, because the driver then crossed the state border and committed a tort, Harrah's can be liable for actions which took place solely within the State of Nevada.

So the concept that a particular defendant can commit a wrongful act which has effects across the state border is not a foreign concept at all. That's the only way tort law can be effective.

THE COURT: Well, couldn't Nevada become a sanctuary, sort of a (inaudible) for taxpaying – non-taxpaying California residents who move to Continental Hotel and say, We're not a resident, sue, be damned. We're going to stay here and you can't touch us.

MR. BURNHART: No, I don't think that's a real fear. What you have here is a situation where if the FTB commits only lawful acts, [20] Nevada is not a haven. We're not challenging the fact that they made a discretionary decision to conduct residency audits as part of their policy. We're not challenging the fact they decided to audit Mr. Hyatt.

In fact, Mr. Wilson has conceded today, there is no interference with that audit process because it's going forward in California. We – and this tort case is distinguishable; separate facts, separate law, separate theories, separate damages. So what happens is if California wants to conduct an audit in Nevada, this action by Mr. Hyatt doesn't stop them.

All this action says is if you come into our state and commit torts, this court has jurisdiction and will adjudicate those torts. Our residents are entitled to a day in court. If you come into our state and don't commit a tort, there will not be a cause of action in Nevada.

THE COURT: Can you describe a little more clearly what those torts are?

MR. BURNHART: Sure. The torts are the envision [sic] of privacy.

[21] THE COURT: 16,000 pages of documents ought to be a tort in itself.

MR. BURNHART: I appreciate that. There are certain things which the FTB has done, and I have one example from the record. They issued a demand to furnish information, sealed in the State of California, and it says, "The people of the State of California to," and then they fill

in the blank, "in the matter of Gilbert P. Hyatt. This demand requires you to furnish this information."

Now, we know that a Nevada agency cannot issue a subpoena to people in California. And yet California decides they're going to use their power, and they cite their statute, Section 19504, the California Revenue Code, and send subpoenas, documents called subpoenas, "Greetings, you have to provide all of this record to us."

The one example I have here, "Please give me the dates of contributions to your church. Give me the date of the church application. Give me the record – you're required to give me the record of all attendance of Mr. Hyatt at all of your church meetings, services and [22] functions."

They came into Nevada without warrant, went to Mr. Hyatt's home, talked to his mail man, talked to his garbage collector. They advertised the fact by taking a picture in front of Mr. Hyatt's home called the trophy picture. We got it.

They went to his ex-wife after a bitter divorce. And, again, just to keep this in perspective, we're not talking about actions that occurred in 1991 when Mr. Hyatt was a resident of California. We're talking only about conduct occurring from 1993 forward, long after the FTB agrees that Mr. Hyatt was a resident of Nevada.

Not a situation where Mr. Hyatt was being audited in California and thought, "Hey, if I move to Nevada, maybe I'll be able to stop California from pursuing me." California knew nothing about him. He was below the radar screen in 1991, 1992, 1993, long after he moved here.

They read an article in a newspaper, talked about this Nevada resident that had acquired some wealth. What happened at that [23] point? Well, his ex-wife, been divorced from over twenty years from the early '70s, sued him in California saying that his twenty years of toiling in the garage in poverty, working on computers, even though they were divorced in the early 1970s, she now in 1993, '94, '95 when he suddenly saw the fruits of those labors come out, sued him. This was in the newspapers.

The FTB reads the newspaper and says, Hey, maybe we can do something. Maybe we can get some money out of this guy. This would be the largest fish in the pond, the biggest residency tax audit.

THE COURT: I don't blame them. There was a $41 million income one year when the residency was disputed. I can't blame a bureaucrat in California for (inaudible) in the case.

MR. BURNHART: And we don't challenge that.

THE COURT: – $41 million dollar taxpayer's (inaudible) to go to Nevada when California has more of them.

MR. BURNHART: We don't challenge that. They had every right to do that. We're not [24] challenging the decision to do the audit. We're challenging the way they conducted the audit, the conduct, the tortious conduct, the wrongful conduct.

If there is not a forum to redress that – and California doesn't provide that understanding. What's going to happen in the residency audit is they will either affirm or change or reject the decision of the auditors on how much tax he owes in California.

Nevada, Judge Saitta was very, very clear in this. She threw out the declaratory relief claim saying that would get too close to questioning whether or not the audit assessment was legitimate. All you can sue on in Nevada are the tort claims, and those very clearly provide a different remedy.

You talk about proof, the elements of a tort. You have to prove the wrongful act. You have to prove that it caused damages. You're not saying it had to cause this amount of tax not to be owed. Those are apples and oranges. We're not trying to and we are not interfering with that audit in the State of California.

THE COURT: Well, Mr. Burnhart, then why [25] are you discovering the entire facts and documents (inaudible) if you're just talking about several discrete tortious acts in the residency, I guess that's even California? Why do you need the entire audit file and all the records and all of these depositions?

MR. BURNHART: Well, the questions that we've asked, and they're in the record, are what did you, Auditor A, do? What acts did you perform on the Hyatt audit? Auditor B, Auditor C, different people, what did you do?

They're very, very much proper questions. And judge – Discovery Commissioner Biggar went through hours and hours and, as you say, thousands of pages of documents and made what I think is a very reasonable decision. He didn't go entirely Mr. Hyatt's way.

He said that when you're alleging the tort, you have to prove what they did to invade the privacy. How did they violate Mr. Hyatt's rights? How did they commit these

negligent misrepresentations, the fraud, the extortion? How did they do it?

You have to ask them what they did. All of that information is solely within the [26] provence of the FTB audit division. We have to ask those questions. And the appropriate way to control a piece of discovery, as you know very well, is for the discovery commissioner to limit it. That's his job.

And our system works very well when each component of the system does its own job. Discovery commissioner worked very hard over several hearings, nine months of review, and made, I think, a very fair decision on the discovery. And the fact that the FTB has to defend itself in a lawsuit is not [sic] extraordinary type of hardship. Everybody – everybody faces that.

The State of New Jersey had a case, the McDonald case, where they said the State of Illinois and its tax collection efforts cannot come into the State of New Jersey and commit employment discrimination against one of its employees, one of its residency auditors. If it does, then they have to answer for those wrongful acts and they have to defend it. They have to submit to deposition. That can be intrusive on their ordinary day-to-day activities, but that's what dispute resolution [27] is all about. So there's nothing odd or unusual about those concepts.

I know I don't have very much time left. I just want to reiterate, in order for this court to close these doors to Mr. Hyatt, it has to find first that it can overrule Nevada v. Hall, U.S. Supreme Court precedence, on point, binding, that this court, the Nevada court's have the power to litigate the case against California.

I believe you also would have to overrule Menecke to say that even though Wisconsin projected its acts into Nevada and you held that that was sufficient, comity is not appropriate. When it's the State of California, you now need to say, Okay. We will grant comity to California. I'm not sure how you make that decision.

You would have to disregard established precedence that government agents are not liable for intentional and operational acts, well-established Nevada law, and finally disregard the district court and the discovery commissioner's incredible efforts to review the facts and law applicable to this case.

* * *

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IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, Honorable Nancy Saitta, District Judge, Respondent, and GILBERT P. HYATT, Real Party in Interest.	Case No. 36390 **REAL PARTY IN INTEREST GILBERT P. HYATT'S PETITION FOR REHEARING RE THE COURT'S JUNE 13, 2001 ORDER GRANTING PETITION FOR WRIT OF MANDAMUS** ***CONFIDENTIAL INFORMATION TO BE FILED UNDER SEAL*** (Filed Jul. 5, 2001)

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I. Issues presented.

A. Did the Court overlook or misapprehend genuine, material facts at issue when it concluded "that there is no probative evidence to support Hyatt's [tort] claims?"

B. Did the Court overlook or misapprehend the law when it granted the FTB's petition "on grounds other than those alleged in the petition?"

II. Summary of argument and relief requested.

Hyatt sued the FTB for torts based on its invasion of his privacy and its fraudulent conduct. Since the Court decided the Writ Petition on issues not raised, briefed or argued, Hyatt has minuscule space to describe – *for the first time to this Court* – his specific claims and the evidence that has been overlooked or misapprehended by the Court. Despite an enormous record, he has space here to address a scant portion of the sufficient probative evidence *in the record* of prima facie claims regarding: (i) a single invasion of privacy claim – disclosure of private facts – and (ii) his fraud claim. Hyatt has equally strong supporting evidence for his various other related tort claims, but no space to address them. Hyatt therefore requests rehearing on all of his tort claims. Surely this Court must accord respect for the fact that the district court *twice* validated Hyatt's tort claims, the discovery commissioner saw and heard sufficient evidence to indicate that the FTB may be guilty of fraud, and even the FTB did not challenge in its writ petition the sufficiency of Hyatt's evidence. Indeed, the record is irrefutably alive with supportive evidence.

III. The Court has overlooked or misapprehended Hyatt's substantial evidence of the FTB's invasion of Hyatt's privacy by its illegal disclosures of Hyatt's private facts.

A. Elements of claim: (i) disclosure or publicity of private facts; and (ii) a reasonable expectation of privacy in regard to the disclosed facts.[1]

[1] This claim is really two: the more recently emerged invasion of informational/constitutional privacy and the more traditional branch of

(Continued on following page)

B. Supporting evidence:

The evidence establishes beyond any doubt that the FTB violated its own non-discretionary rules, regulations, and procedures in illegally disclosing Hyatt's private information and thereby injuring Hyatt. Regardless of whether an individual owes taxes to California, the FTB has no right to ignore its own confidentiality requirements and commit actionable privacy torts under the guise of a tax audit. This claim, and all of Hyatt's claims, are for torts committed by the FTB irrespective of the independent tax proceeding in California.

The Court incorrectly concluded that Hyatt's only evidence in support of this claim (and all others) consisted of his own allegations. The Court overlooked a record replete with documentary evidence, affidavits, and depositions of third persons that establish this claim.

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disclosure of private facts. Each claim involves the disclosure of private facts for which an expectation of privacy had been created and for which a reasonable person would find offensive – particularly informational/constitutional privacy under which disclosure of private, personal information gathered by the government is *per se* unlawful. *See* detailed discussion in Hyatt's opposition to the FTB's motion for summary judgment on pages 21-26 and 31-33, respectively, [*Appdx., Exh. 27*]. *See also* Cal. Const., Art. I, Sec. 1. For the Court's convenience and for clarity in this petition, Hyatt has attached an Appendix hereto containing copies of all exhibits cited herein. Hyatt cites to the attached Appendix in the following format: [*Appdx., Exh. () "x"*]. All exhibits included in the attached Appendix are materials from the record before the Court, and the record cite for each exhibit is set forth in the table of contents for the Appendix.

1. Hyatt reasonably expected an audit by the FTB with no public disclosure of his private information.

As addressed below, based on the FTB's own published regulations, statutory requirements, and explicit representations to Hyatt and his representatives, Hyatt rightly and reasonably expected that the FTB would keep his private information confidential. Hyatt's heightened privacy concerns were, he thought, allayed by the FTB's explicit promises to Hyatt and citations of law mandating confidentiality.

There are numerous examples of FTB publications mandating confidentiality. "It is the *auditor's* responsibility to maintain the security of *all* confidential data during the audit process and to prevent *any* unauthorized disclosure."[2] The FTB is forbidden from providing "confidential information to persons to whom issuance of this information has not been authorized."[3] The FTB emphasizes: "It is the responsibility of FTB agents to ensure that confidential information is not disclosed to unauthorized persons."[4] Auditors are instructed: "*If in doubt, don't disclose*," repeating this mandatory, non-discretionary requirement 16 times in 14 pages in one manual.[5] The FTB even warns its auditors of possible private lawsuits for unauthorized

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[2] FTB Field Audit Manual, at FTB 3762 [*Appdx., Exh. 1*].

[3] FTB Statement of Incompatible Activities and Rules of Conduct, at (1) paragraph I(3) [*Appdx., Exh. 2*].

[4] FTB Disclosure Education Manual, at 11 [*Appdx., Exh. 3*].

[5] FTB Disclosure Education Manual, emphasis in original [*Appdx., Exh. 3*].

disclosures.[6] Yet, included in the FTB's definition of confidential information is the very type of information it disclosed regarding Hyatt.[7]

The record is overflowing with evidence, testimonial and documentary, that provided Hyatt with an absolute, reasonable expectation that his unique need for privacy would be strictly honored by the FTB as stated verbally and in writing, and as required by its own rules. In its initial audit letter, the FTB promised "confidential treatment of any personal and financial information from the auditor assigned to you."[8] In the same document, the FTB sent Hyatt its Privacy Notice, FTB Form #1131,[9] that represented to Hyatt that the FTB was subject to the California privacy act[10] and was required to disclose "why we ask you for information." The FTB indicated that it would only share information with the IRS and other governmental agencies. *It uttered no hint that it intended to divulge Hyatt's private information to non-governmental third parties at the unfettered discretion of its auditors.* It nonetheless did so on a grand scale as summarized below.

[6] FTB Disclosure Education Manual, at 14 [*Appdx., Exh. 3*].

[7] FTB Statement of Incompatible Activities and Rules of Conduct, at (3), paragraph II(2), at (5), paragraph IV, and at (7), paragraph IX [*Appdx., Exh. 2*]; FTB Disclosure Education Manual, at 4 (emphasis added), at 5, and at 13 [*Appdx., Exh. 3*]; and FTB Security and Disclosures Manual, at H 06603, H06659 [*Appdx., Exh. 4*].

[8] FTB Form #1131 [*Appdx., Exh. 5*].

[9] FTB Form #1131 [*Appdx., Exh. 5*].

[10] Officially known as the California Information Practices Act of 1977 ("IPA"), Cal. Civ. Code §§ 1798 *et seq.*

The affidavit of Eugene Cowan, Hyatt's tax attorney, explained in great detail the lengths Hyatt and his representatives went to obtain assurances from the FTB regarding confidentiality.[11] The FTB clearly understood Hyatt's compelling need for keeping not only his private information confidential but also the fact that he was being audited to the point that Hyatt's insistence upon confidentiality was so non-negotiable that the FTB promised strict confidentiality as a *quid pro quo* for obtaining the information and documents its auditors claimed it needed to complete the audit.[12]

Hyatt is by all accounts, a recognized world-class inventor, researcher and licensor whose demands for strict confidentiality were solidly based upon concerns of industrial espionage and theft of trade secretes.[13] Having previously experienced the disastrous effects of security leaks early in his career,[14] Hyatt's need for confidentiality was paramount, as he had licensed many of the world's largest corporations on crucial technologies and was negotiating with many others.[15] The FTB was keenly aware that Hyatt's privacy concerns were both reasonable and non-negotiable, as his secret research lab and secret document files were located in a highly confidential setting not available or discernible as such to the public.[16] Security

[11] Cowan Affid., ¶¶ 9-26 [*Appdx., Exh. 6*], submitted in opposition to the FTB's motion for summary judgment.

[12] Cowan Affid., ¶¶ 9-26 [*Appdx., Exh. 6*].

[13] Hyatt Affid., ¶¶ 18b, 131, 137 [*Appdx., Exh. 7*].

[14] Hyatt Affid., ¶¶ 80, 130-31, 137 [*Appdx., Exh. 7*].

[15] Hyatt Affid., ¶¶ 44, 67, 85, 86 [*Appdx., Exh. 7*].

[16] Hyatt Affid., ¶¶ 10-133, 137 [*Appdx., Exh. 7*].

was so important to Hyatt that he even purchased the facility containing his research lab and invaluable documents through the Kern trust[17] to avoid public disclosure.

2. The FTB unreasonably and illegally divulged Hyatt's private facts.

In violation of the FTB's non-discretionary regulations and statutory requirements, as well as its explicit representations to Hyatt, and contrary to this Court's "findings" that the FTB "complied with its internal operating procedure" and acted "in line with a standard investigation . . . pursuant to its statutory authority," the FTB publicly, repeatedly, and defiantly disclosed Hyatt's private information.

i. The FTB wrongly disclosed the address of Hyatt's secret research lab.

The FTB's disclosure of Hyatt's highly secret Las Vegas address to third parties was a calculated outrage.[18] Despite express assurances that it would not reveal Hyatt's secret information, the FTB violated its own regulations and disclosed Hyatt's secret Las Vegas address to utility companies, including Southwest Gas Corp., Silver State Disposal Service, and Las Vegas Valley Water

[17] Michael Kern is a prominent Certified Public Accountant in Las Vegas.

[18] Portions of FTB 1991 tax year audit file: H01639, H01614, H01643, H01853, and FTB 01992 [*Appdx., Exh. 8*].

District[19] and to three separate newspapers.[20] As a result, Hyatt's painstaking care in locating, securing, and protecting a secret facility was all for naught, as the FTB made it available to public knowledge, a fact that is of the utmost concern and disgust to Hyatt for reasons that any reasonable person in his situation would consider to be of compelling importance.[21]

This reprehensible effort to publicly expose Hyatt's secret address resulted in a major security risk and loss of time and money. As a direct result of the FTB's deliberate privacy violation, Hyatt was forced to purchase another Nevada property, under another trust, and move the research lab, his sensitive documents, and intellectual property to this new location.[22] Since 1995 when the FTB publically disclosed the secret research lab address, various ones of Hyatt's most sensitive trade secrets have appeared in commercial products and in publications.[23]

ii. The FTB wrongly disclosed Hyatt's social security number.

Hyatt had strong reasons to expect that the FTB would respect his right to keep his social security number confidential given FTB representations and published

[19] Portions of FTB 1991 tax year audit file: H 01639, 01641, 01643 [*Appdx., Exh. 9*].

[20] Portions of FTB 1991 tax year audit file: H 01637, 01853, 01855, 01857, 01899 [*Appdx., Exh. 10*].

[21] Hyatt Affid., ¶ 137-138 [*Appdx., Exh. 7*].

[22] Hyatt Affid., ¶ 138 [*Appdx., Exh. 7*].

[23] Hyatt Affid., ¶¶ 80, 130-31, 137 [*Appdx., Exh. 7*].

policies. Yet, the FTB made over *40 unauthorized and illegal disclosures to third parties.*[24] *None* of the recipients were disclosed to Hyatt in advance, as was required by law and FTB regulation, before the FTB disclosed a taxpayer's social security number.[25]

iii. The FTB wrongly disclosed to Hyatt's Japanese licensees that he was being investigated, thereby destroying Hyatt's patent licensing business.

After assurances of strict confidentiality, Hyatt reluctantly agreed to provide excerpts of his agreements with his Japanese patent licensees, Hitachi and Matsushita, and his membership in the Licensing Executives Society.[26] Hyatt contractually committed to his Japanese licensees that the agreements would remain strictly confidential.[27] The FTB violated Hyatt's privacy rights by sending excerpts of the licenses to his Japanese licensees, making clear that Hyatt was under investigation by the FTB, and disclosing that the licensing agreements had been disclosed by Hyatt in violation of the agreements' confidentiality provisions.[28]

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[24] Portions of FTB 1991 tax year audit file [*Appdx., Exh. 8*].

[25] IPA, § 1798.15 [*Appdx., Exh. 12*]; FTB Security and Disclosure Manual, at H 06706 [*Appdx., Exh. 4*].

[26] Hyatt Affid., ¶ 138 [*Appdx., Exh. 7*].

[27] Cowan Affid., ¶¶ 8-26 [*Appdx., Exh. 6*].

[28] FTB 02143 and 02147 [*Appdx., Exh. 11*].

The effect of the licensing disclosures by the FTB in breach of its commitment to Hyatt and the confidentiality clause of the licenses, was significant. Hyatt's patent licensing business was destroyed. From the time of the FTB's unlawful disclosure, Hyatt has obtained no new licensees at all, and his royalty income from new licensees dropped to zero.[29]

The record thus reflects, irrefutably, that there was widespread, unlawful dissemination of Hyatt's personal and confidential information by the FTB. At least 90 pieces of correspondence were disseminated by the FTB to individuals, businesses, trade groups, licensees, etc., whose collective membership totaled in the thousands.[30]

IV. The Court has overlooked or misapprehended substantial evidence of the FTB's fraud.

A. Elements of claim: One or more knowingly false representations, made with the intent it be relied upon, and it is reasonably and detrimentally relied on by a party, resulting in damage to that party.[31]

B. Supporting evidence:

The FTB made two types of false promises to induce Hyatt's cooperation with the audit: (i) that the FTB would keep Hyatt's information confidential, and (ii) that the FTB would conduct a fair, unbiased review. The FTB not

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[29] Hyatt Affid., ¶¶ 136, 162 [*Appdx., Exh. 7*].

[30] Cox Narrative Report, at H00039-00078, [*Appdx., Exh. 13*].

[31] *See, e.g., Albert H. Wohlers and Co. v. Bartgis*, 114 Nev. 1249, 969 P.2d 949 (Nev. 1998).

only breached its promises, but it sought an extorted settlement from Hyatt by overtly threatening further disclosure and publicity. The evidence and damages regarding the first false promise are essentially the same as that addressed in the above section on the closely-related, but separate, invasion of privacy claim. This section therefore addresses the second false promise.

As summarized below, Hyatt has established that the lead auditor created false evidence – which is a criminal offense under California law[32] – and used it to try to extort a settlement from Hyatt.

1. The one-sided fraudulent audit.

The FTB publicly claims to be fair and impartial in its dealings with taxpayers. It professes to interpret the law evenly and fairly with neither a state nor a taxpayer point of view. FTB personnel have testified to this in depositions.[33] Hyatt's first auditor, Marc Shayer, even testified that he promised to conduct a fair and unbiased audit.[34]

Yet, the record shows that the FTB's methods at that time targeted high-income, former California residents, rewarded its own auditors based on the amount they could assess (measured by a cost-benefit ratio), penalized auditors who found "no change" in their audits, and used penalties as "bargaining chips" to induce settlements,

[32] *See, e.g.*, Cal. Rev. & Tax Code § 461, Cal. Pen. Code § 134.

[33] Illia depo., p. 303 [*Appdx., Exh. 14*]. *See also* the FTB Mission Statement [*Appdx., Exh. 28*].

[34] Shayer depo., pp. 474, 476, 482-83 [*Appdx., Exh. 15*].

making the Hyatt audit the biggest potential boost to any auditor's career.[35]

The FTB's third auditor, Sheila Cox, fully acknowledged in deposition testimony that she focused exclusively on information obtained which could be construed as supporting the FTB's position.[36] She completely ignored documentary evidence and witness statements directly contrary to the FTB's preordained conclusion.[37] She did not investigate the most relevant information. If she had, she would have had to conclude Hyatt was a Nevada resident from September 26, 1991 to the present.

The FTB did not conduct a legitimate, bona-fide audit. Instead, the FTB conducted a biased, fraudulent investigation in which Cox destroyed key evidence that supported Hyatt (*e.g.*, her contemporaneous handwritten notes and computer records of bank account analysis).[38] Relevant to her intent, Cox told her husband and others during the Hyatt audits that she was "going to get the Jew bastard."[39] After the audit was concluded and she had assessed Hyatt millions of dollars in trumped-up taxes and penalties, she *telephoned* Hyatt's bitter ex-wife from whom he had been

[35] *See* supporting deposition excerpts and documents cited and included in Hyatt's *Crime/Fraud* brief to the discovery commissioner [*Appdx., Exh. 29*]; *see also* Les depo., pp. 226-228, 615, 674, 678, 684-687 [*Appdx., Exh. 17*].

[36] Cox depo., pp. 168-69, 1618-19 [*Appdx., Exh. 16*].

[37] Cowan Affid., Exhibit 14 thereto [*Appdx., Exh. 6*].

[38] Cox depo., pp. 17, 174-175, 190, 341, 342, 423-24, 569, 605, 661, 861, 971 [*Appdx., Exh. 16*].

[39] Les depo., p. 10 [*Appdx., Exh. 17*].

divorced for many years and bragged about the "conviction."[40] Cox was hardly a fair and unbiased auditor. The discovery commissioner even declared that the FTB may have committed fraud and accordingly ordered that Hyatt was entitled to further discovery on this point.[41]

The FTB disregarded, refused to investigate, ignored, and "buried" the facts favorable to Hyatt which it uncovered during its invasive "audit." For example, the FTB simply ignored:

- the current neighbors in Nevada who supported Hyatt's Nevada residency claim;
- the former neighbors in California who told of Hyatt's move to Nevada;
- the friends and business associates who knew of Hyatt's move to Nevada;
- the adult son who knew of Hyatt's move to Nevada;
- Nevada rent, utilities, telephones, and insurance payments of Hyatt;
- Nevada voter registration and driver's license of Hyatt;
- Nevada home purchase offers and escrow papers of Hyatt;
- Nevada religious, professional, and social affiliations of Hyatt; and

[40] Maystead depo., pp. 182-84 [*Appdx., Exh. 18*].

[41] November 9, 1999 hearing transcript (excerpt), pp. 55-56 [*Appdx., Exh. 26*].

- Hyatt's changes of address from California to Nevada address.[42]

The FTB ultimately prepared and set forth two Narrative Reports totaling 70 pages which supposedly detail the evidence in favor of its conclusion concerning Hyatt's residency as well as asserting fraud penalties against Hyatt.[43] The depositions conducted to date establish that the FTB ignored substantial evidence from Hyatt's neighbors, business associates, and friends favorable to Hyatt and contrary to the FTB's pre-determined conclusion.[44] It never even interviewed Hyatt. The FTB did not even speak with Hyatt's son, Dan, with whom Hyatt had a close ongoing relationship, who loaned Hyatt his utility trailer for Hyatt's move to Las Vegas, and who visited with Hyatt in Las Vegas during April 1992. Rather than interviewing two of Hyatt's long-time business associates, the FTB proceeded to audit them, seeking through intimidation to separate them from Hyatt.[45]

Instead, the FTB interviewed and obtained statements from estranged relatives and an ex-wife that were falsely termed "affidavits," and which formed the cornerstone of the FTB's "case" despite the complete lack of credibility and relevance of the statements.[46] More importantly, the

[42] Cowan Affid., Exhibit 14 thereto [*Appdx., Exh. 6*].

[43] Cox Narrative Report, at H00039-00078 [*Appdx., Exh. 13*].

[44] Cox depo., pp. 1181, 1187-1188 [*Appdx., Exh. 16*]; Cowan Affid., Exhibit 14 [*Appdx., Exh. 6*].

[45] Cox depo., pp. 29, 168-69, 181, 1460-61, 2021 [*Appdx., Exh. 16*]; Hyatt Affid., ¶ 164 [*Appdx., Exh. 7*].

[46] Maystead depo., pp. 182-84 [*Appdx., Exh. 18*]; Hyatt affid., ¶¶ 63, 164, 174, 175, 181 [*Appdx., Exh. 7*].

statements contained in the "non-affidavits" were nothing more than vague and general attacks on Hyatt and provided no specific evidence supporting the FTB's conclusions. The only specific statements in the unsworn "affidavits" were expressly disclaimed by the declarant in concluding that she could not be held to what is stated therein in a court of law.[47] In other words, the "cornerstone" of the FTB's case was built on sand that crumbles upon even mild cross-examination.

2. The $9 million fraud penalty and the FTB's urging Hyatt to settle.

The FTB not only assessed Hyatt taxes for a period after which he had moved to Nevada based on its trumped-up investigation, it assessed Hyatt penalties for alleged fraud in regard to his Nevada residency. The penalties amounted to an additional 75% of the alleged taxes. The FTB teaches its auditors to use the fraud penalty as a "bargaining chip" to obtain "agreement" from the taxpayer to pay the assessed tax.[48] To make its point, the FTB's penalties training manual has on its cover a menacing "skull and cross-bones,"[49] an attitude of intimidation directed at Hyatt through tortious conduct.

In classic extortion form, Jovanovich boldly "suggested" to Hyatt's representative that settling at the "protest stage" would avoid public revelation of Hyatt's personal and financial information. Deposition testimony

[47] H 00302-07 [*Appdx., Exh. 19*].

[48] Ford depo., pp. 128-29 [*Appdx., Exh. 20*].

[49] FTB H 08950 [*Appdx., Exh. 21*].

has confirmed that Jovanovich, the FTB's first protest officer, told Hyatt's tax representative that if he did not settle at the outset of the protest stage,[50] the privacy and confidentiality that Hyatt so valued would be lost.[51]

Specifically, she told Hyatt's tax representation that it would be necessary for the FTB to engage in extensive additional requests for information from Hyatt as that is its practice "in high profile, large dollar" residency audits. In fact, Ms. Jovanovich's own hand-written notes confirm that she told Hyatt's tax representative that in such cases the FTB will conduct an in-depth investigation and exploration "of many unresolved facts and questions" related to Hyatt.[52] Jovanovich also testified that she understood Hyatt had a unique and special concern regarding his privacy[53] and that he was "paranoid" about his privacy – an understanding shared among the FTB auditors and the FTB residency unit.[54]

3. Hyatt was damaged by the FTB's fraud.

Hyatt, having no reason to suspect that the FTB, as an organ of California government, would act in a false, predatory manner, reasonably relied on the truthfulness of the assurances and representations (both explicit and

[50] Cowan Affid., ¶ 32 [*Appdx., Exh. 6*].

[51] Jovanovich depo., pp. 50-52, 168, 185-186 [*Appdx., Exh. 23*].

[52] Jovanovich notes from June 12, 1997 [*Appdx., Exh. 24*].

[53] Jovanovich depo., p. 125, Ins. 20-24 [*Appdx., Exh. 23*].

[54] Jovanovich depo., p. 126, Ins. 4-8 [*Appdx., Exh. 23*].

implied) by the FTB and its agents.[55] Thus relying, Hyatt agreed to cooperate with the FTB and provide it with his highly sensitive and confidential information and documents.[56] Hyatt in fact relied upon the false representations and assurances of the FTB and its agents to his extreme detriment, as explained above.

Two simple facts demonstrate the potential magnitude of the damages.

1. In the past four years prior to the FTB's early-1995 tortious invasions of Hyatt's privacy, he closed license agreements for hundreds of millions of dollars.

2. After the FTB's early-1995 tortious invasions of Hyatt's privacy, he was not able to close a single new license agreement.[57]

If Hyatt's right to a trial is not taken from him, he will prove that the timing of the FTB's tortious conduct and the total destruction of his licensing program is not coincidental, but rather the former caused the latter. In addition to his economic damages, Hyatt suffered emotional distress.[58]

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[55] Hyatt Affid., ¶¶ 10-12 [*Appdx., Exh. 7*].

[56] Cowan Affid., ¶¶ 9-26 [*Appdx., Exh. 6*].

[57] Hyatt Affid., ¶ 136 [*Appdx., Exh. 7*].

[58] This Court has upheld a compensatory damages award for emotional distress "as a result of [a defendant's] fraudulent misrepresentations, concealment, and a bad faith course of conduct." *See Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 969 P.2d 949, 958 (1998).

V. The Court overlooked or misapprehended the law when it granted the FTB's petition "on grounds other than those alleged in the petition."

First, the Court's order violates Hyatt's due process rights by denying Hyatt his day in court without even a hearing before this Court on an issue never raised in the FTB's writ petition. Second, the order is contrary to this Court's own line of cases reversing district court orders that mistakenly grant summary judgment when material issues of fact are in dispute and that require all reasonable inferences to be drawn in favor of the non-moving party, as well as its line of cases refusing to review denials of summary judgment.

These propositions are self evident and very familiar to this Court. Hyatt has no more space in this petition to further develop these points, except to emphasize that the Court is not only unfairly denying him his day in court but is doing so prematurely before he has completed discovery. A substantial part of discovery, including court-ordered discovery, was pending when the Court stayed the action. The remaining discovery was detailed in an affidavit submitted to the district court as an alternative ground for denying the FTB's summary judgment motion.[59] Given this Court's disagreement with the district court regarding the sufficiency of the evidence after its own review and reweighing, Hyatt renews his request to complete discovery before his case is dismissed on such grounds.

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[59] Bourke Affidavit, ¶¶ 182, 183, and 186 [*Appdx., Exh. 25*].

VI. Hyatt again requests leave to file an additional briefing specifically addressing the evidentiary support for his claims.

Hyatt requested leave of court to file a petition in excess of the Court's ten-page limit.[60] Hyatt again renews this request. Whether the Court is inclined to grant or deny the petition, Hyatt should be given a full and fair opportunity to demonstrate the adequacy of his evidence to date. It may be his only "day in court."

DATED this 2 day of July, 2001

HUTCHISON & STEFFEN

BERNHARD & LESLIE, CHTD.

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[60] Hyatt filed his request to exceed the ten page limitation for petitions for rehearing and to extend the time for filing such petitions on June 18, 2001. As of the filing of this petition, the Court had not ruled on this request.

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IN THE SUPREME COURT OF THE

STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, Honorable Nancy Saitta, District Judge, Respondent, and GILBERT P. HYATT, Real Party in Interest.	Case No. 36390 **REAL PARTY IN INTEREST GILBERT P. HYATT'S 15 PAGE SUPPLEMENT TO HIS PETITION FOR REHEARING RE THE COURT'S JUNE 13, 2001 ORDER GRANTING PETITION FOR WRIT OF MANDAMUS** ***CONFIDENTIAL INFORMATION TO BE FILED UNDER SEAL***

Pursuant to this Court's order, Petitioner Gil Hyatt submits this Supplement to his Petition for Rehearing, timely filed on July 2, 2001 (the "Petition"). The Petition addressed the substantial evidence supporting Hyatt's most significant invasion of privacy claim and his fraud claim. This Supplement first demonstrates that there are material facts in dispute in regard to the four issues upon which the Court based its order granting the FTB's petition and then discusses additional facts, evidence and law that the Court overlooked or misapprehended in its order granting the FTB's petition.

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I. Genuine issues as to material fact exist as to the four conclusions reached by the Court in footnote 12 of the June 13 Order.[1]

The Court's June 13 Order concluded that the FTB had met its burden that at least one element of each of Hyatt's claims had not been shown. The Order said the FTB did that " . . . by demonstrating undisputed facts that Franchise Tax Board (1) never produced false statements, (2) never publicized its investigation or findings outside the scope of the investigation, (3) complied with its internal operating procedures with regard to contacting individuals, and (4) merely visited Hyatt's house and conducted its investigation through phone calls and letters."[2] Based on this, the Court then found no genuine dispute "that Franchise Tax Board's acts during its investigation constituted intentional torts[,]" citing Nevada law as to Hyatt's causes of action, at footnote 13. The evidence cited throughout the Petition and this Supplement refutes

[1] The Petition cited to an Appendix of Exhibits 1 through 29 attached thereto in the following format: *[Appdx., Exh. "x"]*. For clarity, this Supplement cites to exhibits in the same manner, with additional exhibits attached to a Supplemental Appendix. Citations to the record for the exhibits attached to the Supplemental Appendix are set forth in its table of contents.

[2] See footnote 12 of June 13 Order. In addition, Hyatt urges the Court to review pages 21 through 26 of Hyatt's opposition to the FTB's motion for summary judgment *[Appdx., Exh. 27]* that discusses the Constitutional and statutory basis and origin of the invasion of informational privacy alleged by Hyatt. The informational privacy rights of Hyatt, and corresponding obligations of the FTB, establish in great part the objective reasonableness of Hyatt's invasion of privacy claims. Moreover, and as discussed below, the FTB is not immune under California law for the invasions of privacy, particularly, the informational privacy, asserted by Hyatt.

this. A brief summary of the evidence, and reasonable inferences which can be derived therefrom, contradicts each of these allegedly undisputed issues."[3]

A. Evidence of record shows that the FTB "produced false statements". Genuine issues of material fact exist as to issue (1) in footnote 12. Evidence of the FTB's false statements include:

> (1) FTB written confidentiality promises contained in its communications to Hyatt;[4]
>
> (2) FTB verbal confidentiality promises, given when Hyatt's representatives insisted on specific pledges of confidentiality in return for Hyatt providing additional information;[5]
>
> (3) FTB promises (and policy requirements) that it would conduct a fair and unbiased audit, but instead buried all evidence favorable to Hyatt;[6]
>
> (4) Audit narrative report re Hyatt was "fiction" according to a former FTB employee;[7]

[3] These facts represent, at a minimum, sufficient evidence to refute the four "undisputed" facts. Because of the FTB's invocation of the "deliberative process" privilege, Hyatt was prevented from getting further facts from the FTB (this was the subject of the FTB's other writ, declared moot in this Court's June 13 order). Since discovery was stayed by this Court's earlier order, Hyatt has not been able to complete his investigation of these and other relevant facts.

[4] Petition, as 2-3. (Hyatt cites to the Petition or this Supplement, *infra*, when the supporting evidence is summarized therein).

[5] Petition, at 3.

[6] Petition, at 6-8.

[7] Les Depo., pp. 10, 25, 172, 176 *[Appedx., Exh. 17]*.

(5) Auditor Cox's statements re interviews with Hyatt's Las Vegas apartment managers, directly contradicted by deposition testimony of the apartment manager;[8]

(6) FTB "Demand for Information" form, which falsely represented to Nevada respondents that they were required by California law to comply with these demands;[9]

(7) FTB false "affidavits," which were not even sworn to, and which were falsely represented by Auditor Cox as containing damaging information about Hyatt;[10]

(8) The FTB falsely stated that the audit file had been through extensive levels of review by FTB reviewers: "The reviewers in Sacramento have finished their extensive examination of the audit file and all of the information regarding Mr. Hyatt's residency status." However, in deposition, the reviewers expressly admitted that they simply relied upon Cox's work in their review of

[8] Kopp Depo., pp. 75-76 *[Supp. Appdx., Exh. 39]*; Lewis Depo., pp. 29, 45, 51 *[Supp. Appdx., Exh. 30]*.

[9] *Infra*, at 8-9.

[10] Bourke Affid., ¶¶ 15, 16, 51, 73 (evidence is cited and summarized therein) *[Appdx., Exh. 25]*. The FTB knew that what it labeled as an affidavit was indeed not a true affidavit – the FTB has reverted to calling them "interview summaries." However, Cox clearly intended to misrepresent these "interview summaries" in her Narrative Report because they served as the foundation for Cox's assessment of fraud penalties (an extremely serious penalty requiring clear and convincing evidence to support): "[A]s evidence of the taxpayer's specific intent to defraud the government, we have gotten affidavits from several individuals that the taxpayer may have cheated on his taxes in the past." See FTB audit work-papers, at H 01892. *[Supp. Appdx., Exh. 45]*.

her assessment.[11] This cursory review also led to the assessment of an additional $6.4 million in taxes and penalties for a total assessment of $9.9 million.[12]

Therefore, this Court cannot say that the FTB "never produced false statements". If the Court believes that these false statements are *de minimus*, it is performing, inappropriately, a fact-finder's function.

B. Evidence of record shows that the FTB publicized its investigation or findings outside the scope of the investigation. Genuine issues of material fact exist as to issue (2) in footnote 12. Evidence of the FTB's publication of its investigation or findings outside the scope of its investigation include:

(1) Auditor Cox's publication of her investigation and findings, and personal defamatory opinions of Hyatt, to Candace Les who had no "need to know."[13]

(2) Auditor Cox's publication of her investigation and findings, and personal defamatory opinions of Hyatt, to non-FTB personnel;[14]

(3) Auditor Cox's publication of her work and findings to Priscilla Maystead, Hyatt's ex-wife when Cox boasted, "We got him."[15]

[11] Lou Depo., p. 81 *[Supp. Appdx., Exh. 44]*.

[12] Ford Depo., p. 90-92 *[Supp. Appdx., Exh. 43]*.

[13] *Infra*, at 7-8.

[14] *Infra*, at 7-8.

[15] Maystead Depo., pp. 182-84. *[Appdx., Exh. 18]*.

(4) Disclosure to Hyatt's Japanese customers that he was under investigation, and revealing that Hyatt had provided the FTB with copies of their confidential agreements;[16] and

(5) Disclosure of Hyatt's private information to three newspapers.[17]

Again, this Court cannot say that the FTB never publicized its investigation or findings outside the scope of the investigation. If the Court believes that these publications are *de minimus*, it is performing, inappropriately, a fact-finder's function.

C. Evidence of record shows that the FTB did not comply with its internal operating procedures with regard to contacting individuals. Genuine issues of material fact exist as to issue (3) in footnote 12. Evidence of the FTB's failure to comply with its internal operating procedures with regard to contacting individuals include violating its policies, rules and procedures:

(1) Despite talking to Hyatt's adversaries, Auditor Cox never interviewed or spoke with Hyatt, or his close associates and close family members, thereby failing to conduct a fair, unbiased audit;[18]

(2) Failure to notify Hyatt or obtain the requested information from Hyatt before disclosing

[16] Petition, at 9.

[17] Portions of FTB 1991 tax year audit file: H 01637, 01853, 01855, 01857, 01899 *[Appdx., Exh. 10]*.

[18] Petition, at 6-8.

social security numbers and other confidential Hyatt information to individuals or businesses;[19]

(3) Failure to contact Hyatt before contacting third parties;[20]

(4) Sending "Demands for Information" to individuals outside the State of California, absent special circumstances;[21]

(5) Advising Hyatt that other taxpayers usually settle to avoid further dissemination of private information, inferring that "this could happen to you, too, if you don't agree to settle".[22]

Therefore, this Court cannot say that the FTB complied with its internal operating procedures with regard to contacting individuals. If the Court believes that these false statements are *de minimus*, it is performing, inappropriately, a fact-finder's function.

D. Evidence of record shows that the FTB did more than "merely visit Hyatt's house and conduct its investigation through phone calls and letters." Genuine issues of material fact exist as to issue (4) in footnote 12. Evidence of the FTB's additional actions include:

[19] Petition, at 5.

[20] Cal. Civ. Code 1798.15; FTB Security and Disclosure Manual, at H06706 *[Appdx., Exh. 4]*.

[21] *Infra*, at 9-10.

[22] Jovanovich Depo., 50-52, 268, 185-86 *[Appdx., Exh. 23]*; Cowan Affid., ¶¶ 38 to ¶¶ 41 *[Appdx., Exh. 6]*.

(1) Visits to Las Vegas apartment complexes and making records of questionable accuracy regarding interviews with apartment managers;[23]

(2) Sending an unprecedented number of "Demands for Information" to individuals outside the State of California;[24]

(3) FTB promises (and policy requirements) that it would conduct a fair and unbiased audit, but instead buried all evidence favorable to Hyatt;[25]

(3) [sic] Searching through Hyatt's Las Vegas trash and mail;[26]

(4) Taking a "trophy" picture in front of Hyatt's Las Vegas home;[27]

(5) Initiating tax audits of close Hyatt associates;[28]

(6) Acknowledging that the FTB believed Hyatt was "paranoid" about privacy, then warning his tax attorney that without a settlement, Hyatt's finances would become public;[29]

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[23] Kopp Depo., pp. 75-76 *[Supp. Appdx., Exh. 39]*; Lewis Depo., pp. 29, 45, 51 *[Supp. Appdx., Exh. 30]*.

[24] *Infra*, at 9-10.

[25] Petition, at 6-8.

[26] Cox Depo., pp. *1077 [Appdx. Eh. 16]*; Les Depo., pp. 268-69, 405 *[Appdx., Exh. 17]*.

[27] Les Depo., pp. 264, 402-03 *[Appdx., Exh. 17]*.

[28] Hyatt Affid., ¶ 164 *[Appdx., Exh. 7]*.

[29] Jovanovich Depo., pp. 50-52, 168, 185-86 *[Appdx., Exh. 23]*; Cowan Affid., ¶¶ 38 to ¶¶ 41 *[Appdx., Exh. 6]*.

(7) Vowing to "get that Jew bastard."[30]

Therefore, this Court cannot say that the FTB did nothing more than visit Hyatt's house and conduct its investigation through phone calls and letters. If the Court believes that these actions are *de minimus*, it is performing, inappropriately, a fact-finder's function.

In effect, the June 13 Order has validated, for all Nevada residents, that the FTB's predatory conduct against Hyatt is reasonable and free of falsity as a matter of law – a cause for celebration at the FTB since such treatment of a California resident would be unlawful and subject to redress under California's Constitution and statutes. The FTB conduct reflected in the record against Hyatt now becomes a "hunting license" for the FTB, where everything it has done against Hyatt may be done with impunity against other Nevada residents. Even deceptive, unauthorized, quasi-subpoenas may now be directed at Nevadans with this Court's blessing in the FTB's most-certain future efforts to target former California residents who have moved to Nevada. Private addresses for celebrities living in Nevada, along with their social security numbers and allegations of possible criminal accountability to California, are now Nevada Supreme Court-approved methods to achieve the FTB's objectives against wealthy Nevada residents, as the June 13 Order has determined that these are reasonable invasions of a Nevada citizen's privacy rights as a matter of law. And under this Court's new standard, any tort claims brought by a Nevada citizen against the FTB will, if not summarily

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[30] Les depo., p. 10 *[Appdx. Exh. 17]*.

dismissed at the district court level, enjoy a *de novo* review by this Court as to the facts, and, unless they are found to be more egregious than those against Hyatt, be ordered dismissed in the district courts.

II. Substantial, probative evidence supports Hyatt's invasion of privacy claims.

A. Substantial evidence of the FTB's illegal disclosures of Hyatt's private facts.

As Hyatt briefly addressed in footnote 1 of the Petition, Hyatt's invasion of privacy claim for disclosure of private facts encompasses both the newer, well-recognized claim for invasion of informational privacy as well as the more traditional claim of public disclosure of private facts. The district court so found in liberally construing Hyatt's claims as consistent with Nevada's notice-pleading standard.[31] Hyatt summarized the supporting evidence in the Petition and through various exhibits attached to the appendix submitted with the Petition.[32] Hyatt's additional invasion of privacy claims are interrelated with this claim, and each is supported by the evidence summarized in the Petition, and further by the additional evidence summarized below.

[31] Nev. R. Civ. P. Rule 8(a).

[32] Petition, at 1-5.

B. Substantial evidence of the FTB's intrusion upon Hyatt's seclusion.

1. **Elements of claim:** (1) an intentional intrusion (physical or otherwise); (2) on the solitude or seclusion of another; and (3) that would be highly offense to a reasonable person."

2. **Supporting evidence:**

In addition to the evidence summarized in the Petition, affidavits and depositions have established the following facts, which give rise to the inference that the FTB unreasonably intruded upon Hyatt's seclusion. First, FTB auditor Sheila Cox made at least three trips to Las Vegas to investigate Hyatt. During these visits, Cox contacted neighbors and other fellow Nevada residents with whom Hyatt either in the past or in the future has had or might reasonably expect to have social or business interactions, and she either disclosed or implied to them that Hyatt was under investigation in California.[33] On one trip she took a colleague, Candace Les, on a covert visit to Hyatt's Las Vegas home[34] – after the audit was over[35] – and took a trophy photograph of Les standing on Hyatt's property in front of Hyatt's residence.[36] This corroborates Les' testimony that Cox was obsessive in her zeal to "get" Hyatt, personalizing the audit in ways that were clearly not "standard" and should be found tortious. Because the

[33] Cox Depo., pp. 426-27, 957, 1329-30, 1873 *[Appdx., Exh. 16]*; Hyatt Affid., ¶ 129 *[Appdx., Exh. 7]*.

[34] Les Depo., p. 42 *[Appdx., Exh. 17]*.

[35] Les Depo. pp. 54-55 *[Appdx., Exh. 17]*.

[36] Les Depo., pp. 264, 402-03 *[Appdx., Exh. 17]*.

audit was closed, FTB policies forbade this curiosity-driven visit as unauthorized stalking.[37] Because the visit was for a nontax purpose, the surveillance was forbidden by the Taxpayers' Bill of Rights.[38] Because the visits were forbidden by FTB policies, Cox's surveying of Hyatt's former apartment and his Las Vegas home violated California's privacy act and published FTB procedures.[39] Cox also made three or more trips to the neighborhood of Hyatt's prior residence in La Palma, which trips included unannounced visits with residents of Hyatt's former neighborhood and questions about private details of Hyatt's life.[40] All of these facts and circumstances, taken together, support Hyatt's claims that he was singled out, by FTB actions which should be found tortious, for unlawful purposes, to further ambitions of FTB auditors and the revenue-enhancing goals of the FTB.

The FTB contacted over one hundred sources, including three newspapers, a dozen neighbors, the Licensing

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[37] Les Depo. pp. 54-55 *[Appdx., Exh. 17]*.

[38] California Revenue & Taxation Code § 21014 *forbidding* any FTB employee from conducting an investigation or surveillance of any person except for tax purposes. For purposes of the prohibition, the Legislature defined investigation as "any oral or written inquiry" and surveillance as "the monitoring of persons, places, or events by means of ... overt or covert observations, or photography, or the use of informants."

[39] California Information Practices Act of 1977, Civil Code § 1798.14; Disclosure Manual, Exhibit 118 at H 06708 *[Appedx., Exh. 3]* ("employees *shall not access or use* personal or confidential information about individuals maintained by the department without a legal right to such information as provided by law and a 'need to know' to perform his/her official duties.") (Emphasis added.)

[40] Cox Depo., pp. 1158, 1161, 1165, 1176 *[Appdx., Exh. 16]*; Les Depo., pp. 24-25, 385-86 *[Appdx., Exh. 17]*.

Executive Society, and Hyatt's Japanese licensees, causing the inference that Hyatt was under a cloud of suspicion.[41] The FTB, through its investigative actions, and in particular the manner in which they were carried out in California, Nevada and Japan, intruded into Hyatt's solitude and seclusion. The intrusions by the FTB support the inference that any reasonable person, including Hyatt, would find them to be highly offensive.[42] Even if these intrusions were part of a "standard" FTB investigation, this is not a defense to this tort, which only requires that the intrusions be intentional, affect the seclusion of another, and be highly offensive to a reasonable person. Clearly, the intrusions were intentional; they affected Hyatt's seclusion; and would be highly offense to a reasonable person under the circumstances.

C. Substantial evidence of the FTB's casting Hyatt in a false light.

1. **Elements of claim:** (1) giving publicity to a matter concerning another; (2) that places the person in a false light; (3) that would be highly offensive to a reasonable person; and (4) that the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.[43]

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[41] Cox Narrative Report *[Appdx., Exh. 13]*.

[42] *See, e.g.*, Hyatt Affid., ¶ 129-138 *[Appdx., Exh. 7]*.

[43] *See Restatement (Second) of Torts* § 652E (1977). Courts have held, however, that to recover for false light, the subject of the publication

(Continued on following page)

2. Supporting evidence:

The evidence summarized above and in the Petition is fully applicable to this claim as well. Moreover, the California Revenue and Taxation Code, and the laws and regulations compiled in the FTB disclosure education materials, forbid disclosure of personal information about a taxpayer to anyone, even to other auditors, who have *no* need to know. But Cox told Les about the murder of Hyatt's son – and called him a "freak" because of it. She disclosed to Les her unsuccessful attempts to start special investigations to investigate Hyatt for fraud, showed Les the narrative report, audit papers, and position letters that lay out extensive detail about Hyatt's personal life and finances, disclosed to Les alternative theories to tax Hyatt, told Les of her meetings with higher-ups on the Hyatt case, and talked about Hyatt incessantly.[44] Cox talked about the case "constantly," "year after year." She talked about the Hyatt case so much and was so unwilling to let it go – even after it was closed – that Les concluded she was so "fixated" and "obsessed" with it that she was beginning to create a fiction in her own head about it.[45]

She told Les about Hyatt's Las Vegas apartment, and his Las Vegas home and his former California house –

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need not necessarily be false. *See, e.g., Douglass v. Hustler Magazine*, 769 F.2d 1128 (7th Cir. 1985), *cert. denied*, 475 U.S. 1094 (1986) (reasoning that use of a photograph out of context was grounds for recovery on false light theory even though photograph was not "false.")

[44] *See* Les Depo., pp. 10-11, 24-26, 42, 49-51, 94-95, 103-104-105, 113-114, 125-126, 140-141, 141-142, 143-144, 167-168, 171-172, 176; 181-82, 245-246; 253-255, 263, 268-269; 275, 345-56, 357-358, 371, 375-376, 385-389, 391 respectively *[Appdx. Exh. 17]*.

[45] *See* Les Depo., pp. 59-60, 61-63, 167-168 *[Appdx., Exh. 17]*.

referring to his old house as a "dump," falsely stating it contained a "dungeon," and calling Hyatt "a bad man." She falsely alleged to Les that he had several Californians on the lookout for the FTB: a "secret" Chinese "gook" girlfriend named Grace Jeng, a "one-armed man," and other "ghouls."[46] She disclosed facts to her friend about his family members, his colon cancer, his patent business, the amount of taxes at issue, her first trip to Las Vegas, her several trips to La Palma, her interviews with Hyatt's Nevada landlord, the tenor of her dealings with Hyatt's tax representatives, and that the Hyatt audit was one of the largest, if not the largest, in history.[47] Cox obtained written statements only from Hyatt's estranged relatives and not from his friends, associates and other family members.[48]

During the FTB's contacts with Hyatt's neighbors, trade association, licensees, employees of patronized businesses, and governmental officials in Nevada, the FTB disclosed that Hyatt was under investigation in California,[49] and engaged in other conduct that would reasonably cause these persons to have doubts as to Hyatt's moral character and his integrity.[50] In short, the FTB's actions in conducting interviews and interrogations of Hyatt's neighbors, business associates, and other Nevada residents, and its conduct in issuing deceitful, unauthorized "Demands to Furnish Information" gave the false, yet

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[46] Les Depo., pp. 10, 25, 172, 176 *[Appdx., Exh. 17]*.

[47] Ford Depo., pp. 148-55 *[Supp. Appdx., Exh., 43]*.

[48] *Hyatt Affid.*, ¶¶ 117, 118, 174, 175 *[Appdx., Exh. 6]*.

[49] Appdx., Exhs. 9-10.

[50] *E.g.*, Chang Depo, pp. 32-33 *[Supp. Appdx., Exh. 32]*.

distinct, appearance that Hyatt was a fugitive from California being investigated as a tax cheater.[51]

In so doing, the FTB: (1) gave publicity to a matter concerning Hyatt; (2) placed Hyatt in a false light; (3) which was highly offensive to Hyatt, as it would be to any reasonable person; and (4) which the FTB had knowledge of or acted in reckless disregard the false light in which it would place Hyatt.

III. Substantial evidence supporting Hyatt's abuse of process claim.

A. Elements of claim: Government agencies commit abuse of process when their demands for information are motivated by an improper purpose, such as to harass the taxpayer or put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.[52] An agency that acquires information in an investigation by fraud, deceit, or trickery commits an abuse of process.[53]

B. Supporting evidence:

The FTB sent numerous Nevada business and professional entities and individual residents "quasi-subpoenas" entitled "Demand to Furnish Information," which cited the FTB's authority *under California law* to issue subpoenas

[51] *See, e.g.*, Hyatt Affid. ¶¶ 129, 143-44 *[Appdx., Exh. 6]*.

[52] *United States v. Tweel*, 550 F.2d 197, 299 (5th Cir. 1977).

[53] *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310, 317 (5th Cir. 1981).

and demanded that the recipients thereof produce the information concerning Hyatt.[54] Moreover, these Demands were captioned on behalf of the "People of the State of California" and were prominently identified as relating to "In the Matter of: Gilbert P. Hyatt", thus creating a reasonable inference that a tax, criminal or punitive investigation of Hyatt had been instituted. The FTB has never claimed that it sought or received permission from any Nevada court or any Nevada government agency to send such "quasi-subpoenas" into Nevada. Many Nevada residents and business entities responded with answers and information concerning Hyatt. These "quasi-subpoena" Demands on their face support the inference that they were calculated to coerce Nevada residents into responding through deception, fear and intimidation. In contrast, more polite correspondence requesting, rather than demanding, information, was sent to Nevada officials such as Governor Bob Miller, Senator Richard Bryan and others who were not sent the illicit "Demands". The inference can be drawn that these individuals would have recognized the absence of any authority for a California tax agency to "Demand" information from a Nevada resident and would have taken offense at such a "Demand."[55]

The Demands wrongfully disclosed Hyatt's social security number and in some instances his private address. Contrary to the requirements of the California

[54] FTB 01882, 01888, 01890, 01892, 01894, 01896, 01897, 01908, 01910, 01912, 01914, 01938, 01940, 01964, 01992, 02043, 02054, 02069, 02081, 02083, 02085, 02087, 02098, 02100, 02294, 02296 *[Appdx., Exhs. 9-10]*.

[55] FTB H 01715, 01716 *[Supp. Appdx., Exh. 35]*.

privacy act, the FTB did not first go to Hyatt; instead, the Demands were sent without his knowledge. Contrary to the same act, the Demands did not disclose to the Nevada recipients that they were voluntary, since California has no power to subpoena information directly from Nevadans. Contrary to the same act, the Demands did not require the recipients to agree to keep Hyatt's personal information confidential. Contrary to the California Financial Privacy Act and the Discovery Statute in California, Cox questioned Hyatt's lawyers, accountants, and financial institutions without Hyatt's knowledge or consent and without first sending Hyatt the required Notice to Consumer. And Cox wrote to two of Mr. Hyatt's most sensitive Japanese customers, enclosing portions of sensitive, confidential multi-million dollar patent licensing agreements, showing that he may have violated the confidentiality clause of the agreements. A reasonable inference is that these actions were intended to damage Hyatt's business relationships.

Moreover, after consulting with Anna Jovanovich,[56] Cox began sending out the Demands For Information. She sent out more Demands to third parties on the Hyatt audits than some auditors sent out in their entire careers.[57] She did so without first ascertaining that the third

[56] 1991-tax-year audit workpapers, FTB 100139 [*Supp. Appdx., Exh. 34*].

[57] Ford Depo., pp. 91-92 [*Supp. Appdx., Exh. 43*]; Shigemitsu Depo., p. 187 [*Supp. Appdx., Exh. 41*]; Alvarado Depo., p. 44, [*Supp. Appdx. Exh. 35*], S. Semana Depo., pp. 82-83 [*Supp. Appdx., Exh. 36*], B. Gilbert Depo., pp. 35-36 [*Supp. Appdx. Exh. 37*], Illia Depo., pp. 178-179 [*Supp. Appdx. Exh. 42*].

party was uncooperative, as required by the FTB's Residency Manual.[58] She did so without first seeking the information from the taxpayer, as required by law.[59] This invasion of Hyatt's privacy has been condemned by the auditors who have been asked about it.[60] A reasonable inference can be drawn that these actions were undertaken with an illegitimate purpose, to further personal and institutional goals at Hyatt's expense, rather than for legitimate, residency audit purposes.

IV. The Court has overlooked or misapprehended the law in considering an issue never raised in the FTB's petition for extraordinary relief.

Since *State v. Thompson*[61] was decided in 1983, Hyatt has not found any instance like this one, where the Court granted a petition for extraordinary relief, on the ground that the district court erred in denying summary judgment because the plaintiff did not establish sufficient probative evidence. Here, the Court specifically stated that "[b]ecause this case implicates the principles of Full Faith and Credit and comity, which are of great importance with respect to

[58] FTB 00844 [*Supp. Appdx., Exh. 38*] (To obtain information from *uncooperative* third parties, the auditor should use the Demand for Information Form (FTB Form 4973).) (Emphasis added.)

[59] Information Practices Act of 1977, California Civil Code § 1798.15 ("Each agency shall collect personal information to the greatest extent practicable directly from the individual who is the subject of the information rather than from another source.")

[60] Illia Depo., p. 248 [*Appdx., Exh. 42*]; Bauche Depo. p. 439 [*Supp. Appdx., Exh. 40*].

[61] 99 Nev. 358, 662 P.2d 1338 (1983).

interpreting each state's sovereign responsibilities and rights, we elect to exercise our extraordinary writ powers."[62] Despite the Court's stated ground for entertaining the FTB's petition, the Court has granted the FTB relief on grounds never raised in its petition.[63] Hyatt is similarly unaware of any opinion in which this Court granted extraordinary relief on a ground which was never raised by the petitioner. Such a notion is contrary to established precedent holding that "the burden on the party seeking extraordinary relief is a heavy one."[64] By granting the FTB's petition on grounds never raised in the petition, the Court has disregarded its own precedent and completely relieved the FTB from its heavy burden.

If, in fact, the Court intended to establish new policy related to writ practice and return to pre-1983 authority under which the Court reviewed denials of summary judgment motions based on sufficiency of the evidence, it should simply deny the FTB writs on the grounds advanced by the FTB, then remand this matter to the district court for further proceedings. Then, an appeal can be

[62] Order, June 13, 2001, at 3.

[63] *Id.*, at 3 (The Court specifically recognized that neither party addressed the sufficiency of Hyatt's evidence.).

[64] *Poulos v. District Court*, 98 Nev. 453, 652 P.2d 1177 (1982). In *Poulos*, although the plaintiff failed to support his opposition to summary judgment with *any* affidavits or other evidence as required, the district court did not grant the defendant's motion for summary judgment. This Court denied the defendant's petition for a writ of mandamus concluding that extraordinary relief was unwarranted because there was "no substantial issue of public policy or precedential value in this case, and . . . no compelling reason why [the Court's] intervention by way of extraordinary writ is warranted." *Id.* at 455-56, 652 P.2d at 1178.

taken with an appropriate lower court record, appellate court briefing and argument, and ultimate decision by this Court. This process would avoid what happened here: this Court essentially acting as a super trier-of-fact through its independent review of a record, which, although large, was not complete (the parties had not completed discovery, which was stayed by this Court). Moreover, the court's duty regarding appeals from summary judgment has always been to scour the record to see *if there are material issues of fact in dispute that would entitle the non-moving party to a trial on the merits, which is always favored*. And it is well-established that an appellate tribunal may not weigh the facts, as the court has done here.

V. The Court has overlooked or misapprehended its own standards regarding review of denials of summary judgment motions.

The essential test for this Court in reviewing Hyatt's Petition for Rehearing is whether the evidence presented on the FTB's summary judgment motion *and reasonable inferences from that evidence, which must be drawn favorably to Hyatt*,[65] meet all the elements of one or more of the claims in Hyatt's First Amended Complaint.[66]

[65] *NGA #2 Limited Liability Co. v. Rains*, 113 Nev. 1151, 1157, 96 P.2d 163, 167 (1997) ("In deciding whether summary judgment is appropriate, the evidence must be viewed in the light most favorable to the party against whom summary judgment is sought; the factual allegations, evidence, and all reasonable inferences in favor of that party must be presumed correct. . . . A litigant has a right to trial when there remains the slightest doubt as to remaining issues of fact.").

[66] As the Court is aware, Judge Saitta dismissed the declaratory relief count from Hyatt's First Amended Complaint when she granted

(Continued on following page)

Hyatt's facts and the reasonable inferences drawn therefrom entitle him to his day in court to argue that the FTB, in and after 1993, undertook a concerted effort to illicitly exact funds from him through fraud and the commission of the other torts that were all utilized to achieve its ultimate, unlawful objectives. As part of the FTB's outrageous attempt to develop a colorable claim against Hyatt, the FTB implemented a strategy which resulted in all Hyatt-adverse facts accepted as true, and the disregard of all Hyatt-supportive facts. The results of this strategy were two FTB audit assessments of enormous amounts. Hyatt is entitled to show that the FTB audits were invasions of his privacy, violations of the FTB's express promises and commitments to him, abuses of process, and fraud. Even the U.S. Congress has criticized the FTB in the Congressional Record for the types of acts complained of by Hyatt.[67] All Hyatt wanted was a fair audit, and the FTB promised that to him. Hyatt is entitled to present to a jury his evidence and theories of the case, that the FTB's promises were never intended to be kept and that Hyatt

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that aspect of the FTB's Motion for Judgment on the Pleadings. In that count, Hyatt had sought a declaration as to when he became a Nevada resident in September, 1991 (per Hyatt) or April 1992 (per the FTB). Therefore, the FTB's references to facts in Hyatt's First Amended Complaint and its assertions as to "undisputed" facts which pertain to Hyatt's residency in 1991 and 1992 are no longer part of Hyatt's claims for relief, the district court having properly exercised her function as a gate-keeper to make sure that sufficient evidence was presented on the claims which she allowed to proceed (no formal amended complaint was filed, or needed to be filed, by Hyatt after Judge Saitta dismissed the declaratory judgment claim as to residency on the FTB Motion for Judgment on the Pleadings).

[67] Vol. 145 No. 114 – Part III Congressional Record (P. E1773-75) *[Supp. Appdx. Exh. 46]*.

was singled out for extraordinarily unfair and damaging treatment because of the FTB's institutional needs to justify its audit (and the auditors' personal goals of advancement) by assessing large taxes, interest, and fraud penalties.

The FTB has repeatedly accused Hyatt of placing his own "spin" on the facts, and Hyatt fully expects the FTB's answer to Hyatt's petition for rehearing to again attack the facts which support each element of Hyatt's claims. Of course, "spin" is just a derogatory expression for a party arguing its version of the facts and the inferences which those facts support, an essential part of our adversary system. If what the FTB derisively calls "spin" is, in fact, a reasonable inference which a fact-finder can draw from the evidence, then this Court's June 13 Order adopts a new standard under which inferences will no longer be permitted to satisfy the elements of a party's claim. In essence, any civil case will require "smoking gun" direct evidence of each element of each claim, and circumstantial evidence and reasonable inferences will not be available to establish such elements for the fact-finder. Clearly, such a drastic change in civil practice should come only after an appropriate district court proceeding and appellate record made with an understanding that those are the rules which now govern civil practice. Hyatt should not be the one to suffer when his case is used as the vehicle for implementing, in an unpublished order, such major changes in civil practice.

Of course, the FTB has and will undoubtedly put forth its own version of the facts, based on its own inferences which it wants this Court to draw (i.e., that it conducted a "standard", fair investigation perfectly within the bounds of its authority). But our adversarial system has always relied on the fact-finder to resolve those issues: does the

fact-finder accept Hyatt's evidence that the FTB has motivated to and did conduct a biased, unlawful and tortious investigation resulting in great personal and professional benefits to the FTB and its auditors, all at Hyatt's expense? Or does the fact-finder accept the FTB's contention that its auditors merely followed their procedures in conducting a standard investigation? This Court stepped into that fact-finder role, as if it were a panel of jurists, and decided to accept the FTB's version of the facts over Hyatt's.[68] Again, such a change in this Court's appellate role should be pronounced in a published opinion, followed by a remand to let the district court review the evidence under this new standard governing the relationship between the district courts and the Supreme Court.

VI. The Court has overlooked or misapprehended the law regarding the FTB's immunity in California for the conduct at issue.

In footnote 7 of its June 13, 2001 order, the Court cites to Section 860.2 of the California Government Code and *Mitchell v. Franchise Tax Board*[69] for the proposition that California accords its government agency immunity for

[68] The majority of the "facts" stated by the FTB relate to whether the FTB had good reason to initiate an audit of Hyatt. Hyatt does not challenge the FTB's right to conduct residency audits, or its right to audit him. His tort claims, instead, deal with the FTB's conduct in performing its audit. This Court's June 13 Order reaches the merits by deciding that the FTB's conduct was not so bad that it gives rise to a tort claim, which is the traditional fact-finder role. This Court, then, is signaling its willingness to evaluate whether the conduct of a particular FTB investigation was (or was not) ordinary and reasonable.

[69] 183 Cal. App. 3d 1133, 228 Cal.Rptr. 750 (1986).

intentional torts. But the statute's plain language provides immunity in California to the FTB and its employees in regard to "instituting" a tax proceeding. It does not apply in this tort case because Hyatt's claims are not based on the FTB *instituting* a procedure or action to collect taxes. Moreover, *Mitchell* held that the plaintiff's claims were all *directly* based on the FTB's institution of an action or proceeding to collect taxes against the taxpayer and placement of a tax lien on that individual's property. While the very fact that the FTB initiated an audit against an individual cannot be the basis of a tort claim, this is ***not*** the basis of Hyatt's suit.[70] Here, as repeatedly stated throughout this lawsuit, Hyatt is not attempting to nor is interfering with the tax protest proceeding in California.[71] Moreover, California's Constitution and California's privacy laws forbid the FTB from engaging in the conduct now alleged by Hyatt and waive sovereign immunity for such conduct.[72] California cannot therefore object if held liable

[70] *Martinez v. City of Los Angeles*, 141 F.3d, 1373, 1379 (9th Cir. 1998) ("Here, [Plaintiff]s' allegations, go beyond the contention that the LAPD officers acted improperly in deciding to seek his arrest. He alleges they acted negligently in conducting the investigation . . . , and they caused his arrest and imprisonment in Mexico."); *see also Bell v. State*, 63 Cal.App. 4th 919, 929, 74 Cal.Rptr. 2d 541 (1998) (holding no immunity under Cal. Govt. Code § 821.6 to state investigators for conduct in executing a search warrant). Section 821.6 of the California Government Code provides immunity for public employees for "investigating or prosecuting any judicial or administrative proceeding."

[71] The evidence is undisputed that this case has not interfered with the tax proceeding. Hyatt's Opp. to Mot. for Sum. Judg., pp. 55-56 *[Appdx. Exh. 27]* and Cowan affid., ¶¶ 43, 44 *[Appdx. Exh. 6]*.

[72] California Constitution, Art. I, sec. 1 (providing that dissemination of data gathered on or about an individual by state agencies is illegal and actionable as invasion of privacy). The California Supreme Court has held that the primary purpose of the Constitutional amendment was to

(Continued on following page)

in Nevada for conduct not protected by its own immunity statute and for which its own laws provide relief to an aggrieved party.

Hyatt's invasion of privacy claims are interrelated and stem from the FTB's iron-clad, Constitutionally-mandated requirement that it respect and not invade Hyatt's privacy. The Court's order of June 13, 2001 properly cited to Nevada law relating to invasion of privacy,[73] but the analysis does not stop there. When "auditing" Nevada residents, the FTB as a public agency of the State of California must comply with its internal, statutory and Constitutional privacy obligations – obligations entirely consistent with Nevada law on invasion of privacy.[74] Otherwise, Nevada residents targeted for audit by the FTB have fewer rights and less privacy than their counterparts in California: a result that neither the Court nor the citizens of Nevada would find palatable.

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provide protection against the encroachment on personal freedom caused by increased surveillance and data collection. *White v. Davis*, 533 P.2d 222, 234 (Cal. 1975). The legislative history of the amendment demonstrates that it was intended to prevent the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party. *Id.* at 234 n.11. California Information Practices Act (Cal. Civ. Code § 1798 *et seq.)* (also providing that improper dissemination of information gathered by state agencies is actionable against the state and allows claim to be brought in "any court of competent jurisdiction").

[73] Order, June 13, 2001, n. 13.

[74] *See* Hyatt Opp. to FTB Mot. for Sum. Judg., pp. 21-26 *[Appdx. Exh. 27]*.

VII. Conclusion.

For the aforementioned reasons, rehearing and remand should be granted in order to afford Hyatt the opportunity to be heard on what this Court found, *sua sponte*, to be the determinative issue.[75] *Before* the court *rules* in a writ petition on an issue which it declares as determinative of Hyatt's entire case, and which he was not *allowed* to address (because under N.R.A.P. 21, Hyatt was ordered to file an answer "directed solely to the issues of arguable cause against issuance of an alternative or peremptory writ . . . ") he should be given the right to be heard on the issue. Where this court thinks a writ may appropriately issue on a ground not even raised, requested or addressed by the party requesting the writ (the FTB), the appropriate remedy is *not* to grant the writ where the prevailing party in the lower court (Hyatt) has been precluded from refuting that ground.

The effect of the Court's broad, sweeping Order is to close the doors of Nevada's courts and prevent any Nevada resident from bringing an action in Nevada for torts committed by a sister state agency. The facts discussed above show clearly that this is not a case built "on gossamer threads of speculation and surmise."[76] *None* of the tortious acts committed against Hyatt, now a 10-year

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[75] At a subsequent hearing before Judge Saitta on July 10, 2001, she commented, with a smile, "I got reversed in the supreme court on an issue that wasn't even raised in the appellate briefs." (Unofficial Transcript page 4, lines 21-23, attached hereto as *Supp. Appdx. Exh. 47*, but this was not a formal part of the record, since this hearing took place after this Court's June 13 Order.)

[76] *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 825 P. 2d 588 (1992).

Nevada resident, are triable in a Nevada court under this Court's June 13 Order, even torts committed *entirely in Nevada*, because that Order takes over the role traditionally (and appropriately) entrusted to the fact-finder.

Finally, this is an extremely high profile matter,[77] and a decision like the June 13 Order which appears to depart from established procedures and precedents of this Court on writ practice and summary judgment standards should be fully argued and briefed before being resolved, before trial, by this Court. As this Court recognizes, "the law favors trial on the merits."[78] If Hyatt is to be denied a trial on the merits, than at a *minimum* he should be allowed to fully argue and brief the issue under any new summary judgment standards which this Court seems to enunciate and find determinative in its June 13 Order.

Accordingly, Hyatt respectfully requests that this Court vacate its June 13 Order, issue an order denying the FTB writ petition as to the grounds for relief asserted therein by the FTB, order the recall of any summary

[77] For example, immediately after this Court's order, the FTB was publicly touting it before its Franchise Tax Board Advisory Board. "FTB Attorney Ben Miller . . . reported that the Nevada Supreme Court sustained FTB auditor efforts in a high-profile *Hyatt* residency case. The Taxpayer had asked the court to halt the FTB audit as 'too intrusive.' In a non-written opinion on June 13, the Nevada Supreme Court held that a Nevada trial court should have granted the FTB's request for summary judgment. Mr. Miller, who has been with the FTB for 31 years, expressed extreme satisfaction with the outcome." (California Taxpayer's Association, *Caltaxletter*, Vol. XIV, No. 26, July 3, 2001, p. 3, *[Supp. Appdx., Exh. 48]*.

[78] *Home Sav. Ass'n Nev. Sav. & Loan Ass'n et al v. Aetna Casualty & Surety Co.*, 109 Nev. 558, 563, 854 P.2d 851, 854 (1993).

judgment entered pursuant to the June 13 Order, and remand this matter for trial on the merits. The Court should also review the extensive record of the Discovery Commissioner and the district court on the second writ (Docket No. 35549, which would no longer be moot, as it was under the Court's June 13 Order) and deny that FTB writ petition as well, ordering the FTB to provide the ordered discovery. Alternatively, Hyatt respectfully requests that this Court remand this matter to the district court to evaluate Hyatt's evidence in light of the standards for writ practice and summary judgment review which the Court establishes in its order following rehearing.

DATED this 23 day of July, 2001

HUTCHISON & STEFFEN

BERNARD & LESLIE, CHTD.

By: /s/ Peter C. Bernhard
Peter C. Bernhard, Esq.

No. 02-42

(7)

Supreme Court, U.S.
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In The
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT AND EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,

Respondents.

On Writ Of Certiorari To The
Supreme Court Of The State Of Nevada

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59 pp

QUESTION PRESENTED

Did the Nevada Supreme Court impermissibly interfere with California's capacity to fulfill its sovereign responsibilities, in derogation of Article IV, Section 1, by refusing to give full faith and credit to California Government Code section 860.2, in a suit brought against California for the torts of invasion of privacy, outrage, abuse of process, and fraud alleged to have occurred in the course of California's administrative efforts to determine a former resident's liability for California personal income tax?

LIST OF PARTIES

Petitioner Franchise Tax Board of the State of California

Respondent Gilbert P. Hyatt

Respondent Eighth Judicial District Court of the State of Nevada, in and for the County of Clark

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The written decision of the Nevada Supreme Court in Docket Numbers 35549 and 36390, dated June 13, 2001, (Order Granting Petition (Docket No. 36390) and Dismissing Petition (Docket No. 35549)). Pet.App. at pp. 38-44.

The written decision of the Nevada Supreme Court in Docket Numbers 39274 and 39312, dated April 4, 2002 (Order Denying Petition for a Writ of Mandamus or Prohibition and Dismissing Appeal), pertaining to the Protective Order. Pet.App. at pp. 19-21.

The Protective Order of the Eighth District Court of the State of Nevada. Pet.App. at pp. 22-35.

JURISDICTION

On April 4, 2002, the Nevada Supreme Court issued its orders (1) denying and granting in part Petitioner's Petitions for Writ of Mandamus and Writ of Prohibition, and (2) denying Petitioner's Petition for Writ of Mandamus and Writ of Prohibition pertaining to the protective order. On July 2, 2002, Petitioner filed a petition for a writ of certiorari. Certiorari was granted on October 15, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(Set forth verbatim in Appendix, *infra*, App. 1)

United States Constitution, Article IV, § 1

California Code of Civil Procedure § 1060.5

California Government Code § 860.2

California Government Code § 905.2

California Government Code § 911.2

California Government Code § 945.4

California Revenue & Taxation Code § 17001

California Revenue & Taxation Code § 17014

California Revenue & Taxation Code § 17015

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California Revenue & Taxation Code § 19044

California Revenue & Taxation Code § 19045

California Revenue & Taxation Code § 19046

California Revenue & Taxation Code § 19047

California Revenue & Taxation Code § 19381

California Revenue & Taxation Code § 19501

California Revenue & Taxation Code § 19504

California Revenue & Taxation Code § 21021

Title 18, California Code of Regulations § 17014

STATEMENT OF THE CASE

1. Summary of the Background

Pursuant to its inherent sovereign power, the State of California imposes a personal income tax upon the income of its residents. The Petitioner is the Franchise Tax Board of the State of California (hereinafter referred to as the "FTB"). The FTB is the California state agency charged with the public duty of implementing and enforcing California's Personal Income Tax Law. Cal. Rev. & Tax. Code §§ 17001 and 19501. Respondent Gilbert P. Hyatt is a former long-time resident of the State of California who filed a return for 1991 with the FTB asserting that he terminated his California residency and moved to Nevada on October 1, 1991, just before certain companies paid him $40 million cash in "patent licensing fees" for patents he obtained while a resident of California. Record of Proceedings at Volume 1, Item 1, p. 3 and Gilbert Hyatt's First Amended Complaint, Pet.App. at p. 78, ¶60.

Hyatt did not report the $40 million as California income subject to the state personal income tax. Record of Proceedings at Volume 3, Item 2, pp. 12-33. The FTB conducted an audit investigation of Hyatt's filing status and issued Notices of Proposed Assessment for the years 1991 and 1992 based upon its determination that Hyatt remained a California resident until April 3, 1992. Record of Proceedings at Volume 3, Item 2, pp. 412-416. In these Notices of Proposed Assessment the FTB also asserted a

civil fraud penalty. Hyatt filed a protest[1] of these Notices of Proposed Assessment. That protest is still pending in California. Record of Proceedings at Volume 3, Item 2, pp. 410-411. After filing his protest, Hyatt filed a suit against the FTB in Nevada seeking a declaration that he was a Nevada resident, a non-resident of California, and is, therefore, not subject to California personal income tax. In the Nevada suit, Hyatt also seeks monetary damages against the FTB for alleged fraud, abuse of process, invasion of privacy, outrage and negligence by the FTB and its agents both in California and Nevada. Complaint JA at pp. 45-70, and Amended Complaint Pet.App. at pp. 49-90.

Hyatt's declaratory relief action was dismissed on the FTB's motion for judgment on the pleadings for lack of subject matter jurisdiction. Order Granting Partial Motion for Judgment on the Pleadings, JA at pp. 93-95. But the trial court refused to dismiss the remaining damage claims. Instead, the Nevada District Court sealed the courtroom from public access. JA at pp. 87-92. The Nevada District Court also imposed a Protective Order upon the FTB preventing it from providing most – if not all – of the information it had obtained in the lawsuit to the FTB officials who were conducting the ongoing administrative tax protest. The order barred the FTB from providing any such documents that Hyatt had designated as confidential, without his permission. The Protective Order requires that, if Hyatt refuses permission, the FTB protest officials must attempt to obtain the documents through California

[1] A "protest" triggers an internal administrative review of the proposed assessments conducted by a hearing officer who is an employee of the FTB. Cal. Rev. & Tax Code § 19041.

judicial processes. Pet.App. at pp. 22-35. In addition, the Nevada District Court ordered the FTB to produce certain documents that, under California evidentiary and administrative laws, would not be required to be disclosed. JA at pp. 135-146.

On December 27, 1999, the Nevada District Court adopted its Discovery Commissioner's Report and Recommendation, which expanded the scope of Hyatt's lawsuit beyond torts that were allegedly committed in Nevada by California government officials into a general inquiry of every aspect of the California tax process as it applied to Hyatt:

> 4. [T]hat the entire process of the FTB audits of Hyatt, including the FTB assessments of taxes and the protests, is at issue in this case and a proper subject of discovery. . . . Hyatt's claim of fraud against the FTB entitles him to discovery on the entire audit and assessment process performed by the FTB that was and is directed at him as part of the FTB's attempt to collect taxes from Hyatt.
>
> 5. [T]he process of the FTB audits directed at Hyatt is squarely at issue in this case.

JA at pp. 137-138.

In explanation of his findings, the Discovery Commissioner explained:

> COMMISSIONER BIGGAR: " . . . but the process I think is still fair game, and if you think otherwise you will have to have the judge say that because obviously in my view if we are only concerned with acts that took place in the state

> of Nevada, then we would have a very small range of discovery in this case because I think everybody is in agreement there were only some few certain acts done in Nevada, investigation by the FTB on premises, so to speak, here as well as inquiring with various Nevada companies and other things, but in my view is only a part of the process of collecting the tax from Mr. Hyatt, and ***the process is what is under attack here***, and I think in my view, particularly a state agency should feel that its process should be open to exploration in a case such as this so that we have an open form of government."

JA at p. 133. Emphasis added.

Findings 4 and 5 of the Nevada Court made the entire audit in California, Nevada, or elsewhere the subject of litigation to determine if government power was improperly used to assess taxes and a fraud penalty. The scope of discovery allowed permits Hyatt to discover and litigate in the Nevada courts every aspect of the governmental functions of California's tax audit. This includes reviewing all decisions made to determine if California's administration of its taxing powers was improper and whether its assessment of a fraud penalty was made for the purpose of allegedly "extorting" a settlement.

The FTB filed its first petition with the Nevada Supreme Court in Docket Number 35549, contesting these discovery orders and the protective order. Record of Proceedings at Volume 1, Item 1.

While that first writ was pending before the Nevada Supreme Court, the FTB filed a motion in the trial court seeking summary judgment on the remaining tort claims and dismissal of the action for lack of jurisdiction. Franchise

Tax Board of the State of California's Motion for Summary Judgment Under Nevada Rules of Civil Procedure, Section 56(b) Or Alternatively For Dismissal Under Nevada Rules of Civil Procedure, Section 12(h)(3). Record of Proceedings at Volume 2, Item 11, Exhibit 7. That motion was denied by the district court, and the FTB filed a second petition in the Nevada Supreme Court, Docket Number 36390. Record of Proceedings at Volume 2, Item 10.

On June 13, 2001, the Nevada Supreme Court granted the FTB's second petition, finding that Hyatt had failed to show any evidence of tortious conduct on the part of the Franchise Tax Board:

> There is no evidence, aside from Hyatt's own conclusory allegations, that the Franchise Tax Board's investigation unreasonably intruded into his private life or seclusion, published false information about him, or published information to third parties that was not of a legitimate public concern. The myriad depositions and documents submitted to this court are undisputed and indicate that Franchise Tax Board's investigative acts were in line with a standard investigation to determine residency status for taxation pursuant to its statutory authority.

Pet.App. at pp. 42-43. The Court ordered the trial court to enter summary judgment in favor of the FTB and dismissed the FTB's first petition as being moot. Pet.App. at pp. 43-44.

On July 5, 2001, Hyatt filed a petition for rehearing. Real Party in Interest Gilbert P. Hyatt's Petition for Rehearing re the Court's June 13, 2001 order. JA at pp. 246-297.

On April 4, 2002, the Nevada Supreme Court, without setting forth any new evidence, vacated its earlier decision and issued a new one denying the FTB's petitions. Pet.App. at p. 5. Returning the matter to the trial court, the Nevada Supreme Court refused to apply California law immunizing the FTB from liability for the alleged common-law intentional torts, stating its justification as follows:

> We believe that greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency.

Pet.App. at pp. 12-13. (Footnote omitted.)

Except for one document, the court also ordered the disclosure and release of the FTB's privileged documents. And the court refused to disturb the "protective order."[2] Pet.App. at p. 22.

2. The Underlying FTB Audit Investigation

The State of California imposes a personal income tax upon the income of its residents. California residents include: (1) every individual who is in California for other than a temporary or transitory purpose; and (2) every individual domiciled in California who is outside California for a temporary or transitory purpose. Cal. Rev. & Tax.

[2] The order also dismissed the the FTB's appeal from the same order.

Code §§ 17014, 17015, 17016. The purpose of these statutes is to ensure that all those who are in California for other than a temporary or transitory purpose, and enjoying the benefits and protection of the State, should in return contribute to the support of the State.[3] When a California taxpayer claims to have changed his or her state of residence, the FTB sometimes performs a residency audit to determine whether the individual did, in fact, become a non-resident of California on or near the asserted change of residency date shown on the taxpayer's California tax return. The residency audit attempts to verify when the taxpayer established significant permanent ties with the new State of claimed residency, and whether the taxpayer severed significant permanent ties with California on or near the asserted change of residency date.

In 1990, Hyatt obtained a patent on certain computer technologies, resulting in over one hundred million dollars of income in late 1991 and 1992. Substantial publicity surrounded Hyatt's patent, including a newspaper article that attracted an FTB auditor's attention in 1993. The 1992 article reported that Hyatt lived in Las Vegas, but was involved in a California legal dispute with his ex-wife about earnings from recent patent awards. Record of Proceedings at Volume 3, Item 11, pp. 53-91.

The FTB initiated an audit of Hyatt's 1991 tax return. Record of Proceedings at Volume 3, Item 11, Exhibit 7, p. 53. In accordance with the provisions of California's

[3] Cal. Code Regs. tit. 18, § 17014 (1988); *Whittel v. Franchise Tax Board*, 231 Cal.App.2d 278, 285, 41 Cal.Rptr. 673 (1964).

Personal Income Tax Law, FTB auditors attempted to obtain information and records verifying Hyatt's claim of California non-residency. JA at pp. 181-191. The FTB talked by phone to third parties with potentially relevant information, such as the Clark County Assessor's Office, and kept records reflecting the nature of each inquiry. Record of Proceedings at Volume 3, Item 11, Exhibit 2. The FTB interviewed third parties in California and Nevada, such as Hyatt's neighbors and relatives, and in some instances obtained statements from them about Hyatt's change of residency claim. Record of Proceedings at Volume 3, Item 11, Exhibit 2. The FTB also corresponded by mail with third parties either by letter alone, or by a letter accompanied by a "Demand to Furnish Information," a standard FTB form reflecting the statutory authority to obtain information in a tax audit. Cal. Rev. & Tax. Code § 19504; JA at pp. 185-188. FTB auditors also traveled to Las Vegas in March 1995, and spent partial days on each of three consecutive days visiting businesses, talking to neighbors and neighborhood workers, and observing Hyatt's alleged Nevada residence. JA at pp. 187-188.

During late November 1995, the FTB lead auditor, Sheila Cox, also accompanied another FTB auditor to Las Vegas to assist on the other auditor's cases, and made a brief observation of Hyatt's alleged residence during the trip. Hyatt claims that during this latter trip, Ms. Cox went through Hyatt's garbage, rifled through Hyatt's mail, and trespassed on Hyatt's property. JA at p. 189. The FTB disputes Hyatt's version of events on this trip. JA at pp. 181-191.

3. California's Immunity Statutes

California law provides immunity for the State, its taxing agencies, officials, and employees for injuries caused by instituting an administrative tax proceeding and for acts incidental to the assessment or collection of a tax. The immunity statute, which has no geographical restriction on its application, provides:

> Neither a public entity nor a public employee is liable for an injury caused by:
>
> (a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax.
>
> (b) An act or omission in the interpretation or application of any law relating to a tax.

California Government Code § 860.2.[4]

SUMMARY OF ARGUMENT

California's broad statutory scheme of immunities protects its ability to carry out its core sovereign responsibilities both within and outside of its own territorial

[4] This statute has been broadly construed by California courts. *Mitchell v. Franchise Tax Board*, 183 Cal.App.3d 1133, 1136, 228 Cal.Rptr. 750 (1986). California Government Code § 860.2 is not the only immunity statute applicable in this case: California Government Code §§ 911.2, 905.2, and 945.4 also bar money damage suits against state agencies. California statutes do not, however, provide the State with absolute immunity: for example, California Revenue and Taxation Code § 21021 establishes a cause of action in California's own courts for a tax agency's failure to follow published procedures.

borders; however, Nevada courts refused to recognize California's immunities in this lawsuit. California contends that full faith and credit requires Nevada courts to recognize California's immunities.[5]

In *Nevada v. Hall*, 440 U.S. 410, *reh'g denied*, 441 U.S. 917 (1979), addressing the facts presented by that case, this Court adhered to a generally recognized exception arising in choice-of-law cases that full faith and credit need not be extended to laws of a sister State where those laws conflict with the forum State's own policies. This exception has arisen in cases involving suits between private parties involving the question of whether the forum State or a different State's laws should apply. In footnote 24 of *Nevada v. Hall,* the Court anticipated a case such as the present one and explained that where the refusal to extend full faith and credit poses a "substantial threat to our constitutional system of cooperative federalism" (440

[5] Immunity statutes reflect a State's sovereign choice to define the limits of its exposure to liability for the action of its governmental officials, balancing principles of fairness against the legitimate needs of government. The immunities provided by California are commonly provided to tax administrators throughout the country, for example: Hawaii HAW. REV. STAT. ANN. § 662-15(2) (Michie 2002); Idaho (IDAHO CODE § 6-904A(1) (Michie 1998)); Massachusetts (MASS. GEN. LAWS ANN. ch. 258, § 10(d) (West 1988 & Supp. 2002)); Minnesota (MINN. STAT. ANN. § 3, 736, subd. (3)(C) 1998 & Supp. 2002), *but see, e.g.*, MINN. STAT. §§ 270.275-276 (1998 & Supp. 2002) (limitations on immunity)); Mississippi (MISS. CODE ANN. § 11-46-9(1)(I) (2002)); Nebraska (NEB. REV. STAT. § 81-8, 219(2) (1996)); Oklahoma (OKLA. STAT. ANN. tit. 51, § 155(11) (West 2000 & Supp. 2002)); South Dakota (S.D. CONST. art. III, § 27; S.D. CODIFIED LAWS §§ 21-32-16 to -18 (Michie 1987) §§ 3-22-10, -17) (Michie 1994)); Utah (UTAH CODE ANN. §§ 63-30-10(8), 59-1-704 (1997 & Supp. 2002)); Vermont (V.T. STAT. ANN. tit. 12, § 5601(e)(2) (1973 & Supp. 2001)).

U.S. at 424 n.24), such as where it interferes with a State's "capacity to fulfill its own sovereign responsibilities" (*ibid.*), a "different analysis or a different result" (*ibid.*) might be required. In this case a different analysis is required because the analysis under existing full faith and credit cases is inadequate to deal with the facts of this case.

California believes that this different analysis requires a different rule of law, one that is both simple and straightforward, and one which takes into consideration the concerns identified by the Court in footnote 24. California submits that:

> A forum State may not refuse to extend full faith and credit to the legislatively immunized acts of a sister State when such a refusal interferes with the sister State's capacity to fulfill its own core sovereign responsibilities.

This rule is designed to eliminate the threat to cooperative federalism by mandating full faith and credit in those circumstances where refusal to extend full faith and credit to a State's legislatively immunized acts would interfere with a State's ability to carry out its core sovereign responsibilities. This rule is supported by (1) the history of the Full Faith and Credit Clause, (2) this Court's own jurisprudence, and (3) the jurisprudence of other States interpreting and applying *Nevada v. Hall*.

In addition, when the present case is examined under the rule suggested above, it is clear that the rule applies and that Nevada courts must extend full faith and credit to California's immunity laws because (1) California's conduct of the Hyatt residency tax audit is a core sovereign responsibility, and (2) Nevada's refusal to extend full

faith and credit to California's immunity statutes *interferes* with California's capacity to conduct the Hyatt residency tax audit. When these two requirements of the rule are met, Nevada must extend full faith and credit because its refusal to do so poses a "substantial threat to our constitutional system of cooperative federalism." *Ibid.*

ARGUMENT

I. THE NEVADA SUPREME COURT VIOLATED ARTICLE IV, SECTION 1 OF THE CONSTITUTION BY REFUSING TO RECOGNIZE CALIFORNIA'S IMMUNITY STATUTES IN A LAWSUIT AGAINST THE STATE OF CALIFORNIA BY A PRIVATE CITIZEN THAT AROSE OUT OF ACTIVITIES INCIDENTAL TO THE ASSESSMENT AND COLLECTION OF CALIFORNIA STATE TAXES

A. The Current Choice-of-Law Analysis Does Not Adequately Resolve the Constitutional Issues in the Present Case; a New Rule is Needed

California's dispute with Nevada's courts presents a constitutional confrontation that goes to the very core of cooperative federalism and raises important constitutional questions that existing cases do not adequately answer. California believes that these unanswered questions require this court to adopt a new rule, a rule that California submits is necessary to resolve the "substantial threat to our constitutional system of cooperative federalism" (*Nevada v. Hall*, 440 U.S. at 424 n.24) that is presented by this case. The new rule is, in fact, suggested by the

language in footnote 24 of this Court's opinion in *Nevada v. Hall*.

Under this new rule, Nevada (or any forum State) may not refuse to extend full faith and credit to the legislatively immunized acts of a sister State when such a refusal interferes with the sister State's capacity to fulfill its own core sovereign responsibilities. This rule necessarily limits the ability of a forum State to use its own law to extend its judicial authority beyond its own geographic borders to interfere with the governmental policies and actions of a sister State.

The existing choice-of-law rules are inadequate to address a case such as this where the subject of the litigation is the manner in which a sister State is conducting a core government function. In general, this Court has explained that as long as a forum State has sufficient contacts with a lawsuit, it is not required to use the law of a sister State when to do so would offend its own public policy. *See Baker v. General Motors Corp.*, 522 U.S. 222, 232-33 (1998); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 733 (1988); *Phillips Petroluem Co. v. Shutts*, 472 U.S. 797, 818-19 (1985); *Carroll v. Lanza*, 349 U.S. 408, 412 (1955); *Pacific-Employers Insurance Co. v. Industrial Accident Comm'n of Cal.*, 306 U.S. 493, 501-505 (1939) (hereinafter referred to as *Pacific Insurance*); *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 308 (1981).

However, these cases are inadequate to address the constitutional issue framed by footnote 24 in *Nevada v. Hall* because they do not involve the exercise of core government activities. They fail to address the constitutional issues because they focus on the forum State's interest as a forum and the interest of the party filing suit,

rather than on the effect the choice of law will have on the non-forum party State's ability to carry out its core functions. *Baker v. General Motors Corp.*, 522 U.S. 222, 232-33 (1998), involved a personal injury lawsuit between private parties. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 733 (1988), and *Phillips Petroluem Co. v. Shutts*, 472 U.S. 797, 818-19 (1985), concerned private class actions over oil royalties. *Carroll v. Lanza*, 349 U.S. 408, 412 (1955), and *Pacific-Employers Insurance Co. v. Industrial Accident Commission of California*, 306 U.S. 493, 501-505 (1939), considered the issue of workmen's compensation. *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 308 (1981), involved a wrongful death dispute between private parties.

In *Pacific Insurance,* the question was whether full faith and credit required California to apply Massachusetts' workers' compensation law in a case where a Massachusetts employee of a Massachusetts employer was injured in California while acting in the scope of his employment. This Court held that California was *not* required by full faith and credit to apply Massachusetts law because it contravened the policy of California's more liberal workmen's compensation Act. 306 U.S. at 502-503. *Pacific Insurance* acknowledged that Massachusetts "ha[d] an interest in safeguarding the compensation of Massachusetts employees while temporarily abroad in the course of their employment," (*ibid.*) but explained that California had a more significant interest in being able to exercise its own "constitutional authority . . . to legislate for the bodily safety and economic protection of employees injured within it." *Ibid.* In fact, this Court explained that "[f]ew matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power." *Ibid.* In contrast to the analysis of the

respective interests of the States, the case did not analyze the effect the choice of law would have on the non-forum State's ability to carry out its core government functions.

Nevada v. Hall posed a question similar to that in *Pacific Insurance*: does full faith and credit require California to apply Nevada law in a case which arose out of a traffic accident caused by a Nevada state employee driving in California while on Nevada state business? This Court held that California was *not* required by full faith and credit to apply Nevada's damage limitation because it contravened the policy of California's more liberal damages law. This Court examined California's interest and compared it to California's interest in *Pacific Insurance*, noting that "[a] similar conclusion is appropriate in this case." 440 U.S. at 424.

> The interest of California afforded such respect in the *Pacific Insurance* case was in providing for "the bodily safety and economic protection of employees injured within it." In this case, California's interest is the closely related and equally substantial one of providing "full protection to those who are injured on its highways through the negligence of both residents and nonresidents." To effectuate this interest, California has provided by statute for jurisdiction in its courts over residents and nonresidents alike to allow those injured on its highways through the negligence of others to secure full compensation for their injuries in the California courts.

Ibid. (citations omitted). Just as with *Pacific Insurance*, *Nevada v. Hall* analyzed the respective States' interests, but failed to analyze the effect the choice of law would have on the non-forum State's ability to carry out its core government functions.

Indeed, anticipation of this very failing appears to have prompted the concerns that were expressed in footnote 24 of *Nevada v. Hall*. Footnote 24 explained that a different analysis and different result may be necessary where a forum State's refusal to extend full faith and credit poses a substantial threat to our constitutional system of cooperative federalism.

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or Nevada, might require a different analysis or a different result.

Id. at 424 n.24. This text illustrates that in some situations it may be necessary to develop a rule based upon effect, rather than interest. This is shown by the language "interfere with Nevada's capacity to fulfill its own sovereign responsibilities," (*ibid.*) which focuses on the effect, rather than the interest. The key is that effect must be factored in whenever the choice-of-law decision "interferes" with a State's ability to carry out its core government functions.

Both *Nevada v. Hall* and *Pacific Insurance* support our constitutional system of cooperative federalism because they allow a State to apply its own law in cases where full faith and credit would otherwise force application of a foreign law contrary to its own policy. Both are "interest" based cases that focus primarily on the forum States' *interest* in applying their own law: in *Pacific Insurance*, California's interest in applying its own workmen's

compensation law to an employee injured while on the job in California; and in *Nevada v. Hall*, California's interest in applying its own more liberal damages law. In these cases, cooperative federalism was served by an interest-based analysis, but application of only the interest-based analysis in this case actually *thwarts* cooperative federalism because it fails to consider the effect the choice of law would have on the non-forum State's ability to carry out its core government functions. This failure to factor in the effect on core government functions is why a new rule or test must be developed.

When the *subject* of the litigation is the State's *activities* in carrying out its critical or core governmental functions, the ordinary rules are inadequate because they do not provide any consideration for effect on the State's *ability* to carry out its essential functions. Under the interest test, any law reflecting conflicting policy of the forum State, no matter how insignificant, will trump the non-forum State's law, no matter how adversely it affects its ability to carry out vital governmental functions.

In some cases, such as this one, it is the use of the interest-based test, alone, that creates a threat to cooperative federalism because it completely fails to examine whether the choice-of-law decision has the effect of interfering with the non-forum State's ability to carry out its core sovereign functions. In order to remedy this threat to cooperative federalism, California has developed what it believes is the best test that can be used where the litigation involves legislatively immunized activities undertaken in carrying out the State's core government functions, a test that looks to the *effect* of the choice-of-law decision, *i.e.*, whether there is interference. Specifically, the California rule provides that:

> A forum State may not refuse to extend full faith and credit to the legislatively immunized acts of a sister State when such a refusal interferes with the sister State's capacity to fulfill its own core sovereign responsibilities.

In addition to resolving the threat to cooperative federalism posed by using only the interest-based test, California's proffered rule should be adopted because it is supported by the history of the Full Faith and Credit Clause, this Court's own jurisprudence, and the jurisprudence of various other States in interpreting and applying *Nevada v. Hall*.

1. The History of the Full Faith and Credit Clause Supports California's Suggested Rule

Prior to the adoption of the Articles of Confederation and the Constitution, each state (or colony) was a sovereign and independent government. As independent governments they had the power to enact laws governing local matters, wage war, levy taxes and engage in any number of acts of sovereign responsibility. As independent nations they were free to accept or reject the laws or acts of other nations subject only to treaties or principles of comity. Prior to the Articles of Confederation, the colonies had to a large extent ignored the rulings of other colonies and even some of the rulings of England. Litigants could re-litigate their cases in different jurisdictions without much concern for rulings in other colonies. However, more enlightened principles of comity (at least regarding judgments) took

hold before the enactment of the Articles of Confederation.[6] These principles of comity, which were based upon enlightened self-interest, and which meant that most colonies granted full credit to other State's judgments and court rulings, were then incorporated into the Articles of Confederation.[7]

At the Constitutional Convention of 1787, these principles were explicitly included in Article IV, Section 1 of the United States Constitution; indeed, they were expanded to include in addition each State's public acts and records. The Full Faith and Credit Clause of the United States Constitution specifically provides that:

> Full faith and credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const., art. IV, § 1.

The Full Faith and Credit Clause was placed in Article IV along with other provisions designed to establish a single republic with equal privileges being accorded the several States,[8] and the citizens of each state throughout the rest of

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[6] James D. Sumner, Jr., *The Full-Faith-And-Credit Clause – It's History And Purpose*, 34 Or. L. Rev. 224, 228-229 (1955).

[7] *Ibid.*

[8] Article IV, § 3, Clauses 1 and 2 deal with new States, while Article IV, § 4 guarantees every State a republican form of government and protects each State from invasion and domestic violence.

the United States.[9] It establishes the importance of single nationhood, with the promise that the obligations and privileges of the States and their citizens would not end at one State's border.

Despite the dearth of legislative history, there is little doubt that the Full Faith and Credit Clause was intended to ensure harmony and peaceful intercourse among the states without relying on the uncertainties of comity.[10] It was, in effect, an internal treaty among the States. As such, although the several States maintained all the sovereignty not ceded to the nation, they also collectively forged a single integrated union where, unlike foreign nations, the States were not free to ignore the laws and acts of the nation or their sister States, even when those laws might conflict with their own:

> [T]he very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereigns, each free to ignore obligations created under the laws or by judicial proceedings of the others, and to make them integral parts of a single nation. . . .

Milwaukee County v. M.E. White Co., 296 U.S. 268, 276-77 (1935).

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[9] Article IV, § 2, Clause 1 provides that "citizens of each state shall be entitled to all privileges and immunities of citizens in the several states[;]" and § 2, Clause 2 provides that fugitives from justice from one state shall "be removed [back] to the state having jurisdiction of the crime."

[10] Robert H. Jackson, *Full Faith And Credit – The Lawyer's Clause Of The Constitution*, 45 Colum. L. Rev. 1, 5 n.17 (1945); Benjamin Cardoza, *The Growth Of The Law* 136 (1924).

The purpose of full faith and credit was, then, to alter the status of the States, which it did by abandoning reliance on comity and making conflict of law principles constitutionally mandated. The Full Faith and Credit Clause "substituted a command for the earlier principles of comity and *thus* basically altered the status of the States as independent sovereigns." *Estin v. Estin*, 334 U.S. 541, 546 (1948) (emphasis added). Indeed, "the clause . . . made conflicts principles enforceable as a matter of constitutional command rather than leaving the enforcement to the vagaries of the forum's view of comity." *Sun Oil Co. v. Wortman*, 486 U.S. at 723, n.1.

Years ago this Court recognized that the Clause would be properly invoked to restrain "any policy of hostility to the public Acts [of another state]." *Carroll v. Lanza*, 349 U.S. 408, 413 (1955). In this case, Nevada's refusal to extend full faith and credit to California's immunity laws results in a "policy of hostility" to California's tax acts, a policy that the Full Faith and Credit Clause was intended to restrain. This restraint against hostility can be accomplished by this Court adopting California's suggested rule.

While there may be little legislative history on the Full Faith and Credit Clause,[11] this Court's historical analysis supports California's interpretation that full faith and credit provides a virtual absolute barrier to one State allowing its processes – including its courts – to impinge upon the constitutionally valid exercise of a sister State's sovereign responsibilities. This interpretation is based on

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[11] *See Nevada v. Hall*, 440 U.S. 410; Jackson, *supra* note 10, at 5 n.17.

the principles of cooperative federalism and reciprocal respect, which are at the heart of the Full Faith and Credit Clause. It is likely that Nevada's refusal to extend full faith and credit in this case is just what the Full Faith and Credit Clause was designed to thwart.[12]

2 The Fact That This Court's Own Jurisprudence Recognizes the Limitations of an Interest-Based Test Supports the Rule California Suggests

The rule that California advances here – that a forum state may not refuse to extend full faith and credit to the legislatively immunized acts of a sister State when such a refusal interferes with the sister State's capacity to fulfill its own core sovereign responsibilities – is grounded in the concerns expressed by the Court in footnote 24 of *Nevada v. Hall*, 440 U.S. 410. *Nevada v. Hall* was a tort action against the State of Nevada in a California state court, which arose out of a traffic accident caused by a Nevada state employee driving in California while on Nevada state business. This Court held that a court need not give full faith and credit to another State's laws if those laws conflicted with the *policy* of the forum State; thus, California need not give full faith and credit to Nevada's statutory

[12] In THE FEDERALIST, No. 42, James Madison noted that the clause was "an evident and valuable improvement on the clause relating to this subject in the articles of Confederation" and that the power "may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States, where the effects liable to justice may be suddenly and secretly translated in any stage of the process, within a foreign jurisdiction." THE FEDERALIST No. 42 (James Madison).

limitation on liability for injuries caused by a Nevada state employee since it was in conflict with California's policy against any such limitation. This holding was tied to the Court's own interest-based choice-of-laws analysis adopted in cases involving lawsuits between two private litigants. However, footnote 24 in *Nevada v. Hall* makes it clear that ruling itself was fact-based and limited; it acknowledges that a different analysis and different result may be necessary where a forum State's refusal to extend full faith and credit poses a "substantial threat to our constitutional system of cooperative federalism." *Id.* at 424 n.24.

The thrust of footnote 24 is that this different analysis and result is necessary to protect "our constitutional system of cooperative federalism." *Ibid.* Nevada's refusal to extend full faith and credit to California's immunity laws in this case poses the very threat to the constitutional system of cooperative federalism that footnote 24 cautions against. Footnote 24 suggests that it is improper to deny full faith and credit where to do so "interfere[s] with [the sister State's] capacity to fulfill its own sovereign responsibilities." *Ibid.* While a suit involving a traffic accident occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities, a suit against California based on activities such as the Hyatt residency audit, which is incident to the assessment or collection of a California state tax, clearly "interferes" with California's "capacity to fulfill its own sovereign responsibilities." *Ibid.* California submits that the concerns articulated in footnote 24 can best be addressed by California's effects-based test: a forum State may not refuse to extend full faith and credit to the legislatively immunized acts of a sister State when such a

refusal interferes with the sister State's capacity to fulfill its own core sovereign responsibilities.

Footnote 24 does not exist in a vacuum; Justice Blackmun's dissent in *Nevada v. Hall* places it in perspective. Justice Blackmun warns against almost precisely what has occurred in this situation. ("States probably will decide to modify their tax-collection and revenue systems in order to avoid the collection of judgments." *Id.* at 429.) Footnote 24's cautionary instructions have appeared in other decisions of this Court, as well. For example: Justice Stevens, the author of the majority opinion in *Nevada v. Hall,* authored a concurring opinion in *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1980),[13] that is consistent with California's suggested rule. Justice Stevens recognized

[13] In *Allstate*, a Wisconsin resident employed in Minnesota died on his way to work in Minnesota when the motorcycle he was on was struck from behind by an automobile while he was still in Wisconsin. The operators of both vehicles were Wisconsin residents, neither of who had valid insurance. The decedent had a policy covering three vehicles he owned with uninsured motorist coverage for $15,000 for each vehicle. *Id.* at 305. The widow moved to Minnesota for reasons unrelated to the litigation and filed suit in Minnesota, where she sought declaratory relief under Minnesota law that the three policies could be "stacked." The defendant claimed that Wisconsin law, which precluded such "stacking," should apply. *Ibid.* The plurality opinion of this Court concluded that full faith and credit did not require Minnesota to apply Wisconsin law because, even though application of Minnesota law may have been unsound as a matter of conflict of laws, there was no threat to Wisconsin's sovereignty by allowing the use of Minnesota's substantive law. *Id.* at 313. The plurality opinion further concluded that due process did not prevent Minnesota from applying its own law since neither the "stacking" rule itself nor Minnesota's application of it to the private litigants raised any serious question of fairness. *Id.* at 320.

that full faith and credit mandates that States not infringe on other State's sovereignty:

> The Full Faith and Credit Clause implements this design by directing that a State, when acting as a forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringement upon their sovereignty.

Id. at 322 (Stevens, J., concurring). While "respect [for] the legitimate interests of other States" (*ibid.*) acknowledges the need for an interest-based test in some circumstances, Justice Stevens' recognition that States must "avoid infringement upon [other State's] sovereignty," (*ibid.*) suggests the need for an effect-based test that focuses on interference or "infringement upon . . . sovereignty." *Ibid.* Justice Stevens also explained that:

> The kind of state action the Full Faith and Credit Clause was designed to prevent has been described in a variety of ways by this Court. In *Carroll v. Lanza*, 349 U.S. 408, 413 (1955), the Court indicated that the Clause would be invoked to restrain "any policy of hostility to the public Acts" of another State. In *Nevaaa v. Hall*, *supra*, at 424, n. 24, we approved action which "pose[d] no substantial threat to our constitutional system of cooperative federalism." And in *Thomas v. Washington Gas Light Co.*, U.S. 261, 272 (1980), the plurality opinion described the purpose of the Full Faith and Credit Clause as the prevention of "parochial entrenchment on the interests of other States."

Id. at 323 n.10 (Stevens, J., concurring). These concerns are addressed in the present case by an effect-based rule. For example: his statement that *Nevada v. Hall* posed "no

substantial threat to our constitutional system of cooperative federalism," *ibid.* is especially significant because it suggests that in a proper case – such as this case – where there is such a threat, the Full Faith and Credit Clause would bar the forum State from using its own law when doing so would create – as here – a "substantial threat to our constitutional system of cooperative federalism." *Ibid.* California's effect-based test accomplishes this. In addition, California's suggested rule is the very least that is necessary to guard against the evils Justice Stevens identified in *Allstate*, and specifically to "restrain 'any policy of hostility to the public Acts' of another State," and to prevent the "parochial entrenchment on the interests of other States." *Ibid.*

3. The Jurisprudence of Other State's Interpreting And Applying *Nevada v. Hall* Supports California's Suggested Rule

The courts of other States have also recognized (as footnote 24 suggests) that *Nevada v. Hall's* interest-based test is inadequate and does not apply where the case deals with a forum State's interference with a sister State's ability to carry out its core sovereign responsibilities. These cases fully support the rule California advances: that a forum State may not refuse to extend full faith and credit to the legislatively immunized acts of a sister State when such a refusal interferes with the sister State's capacity to fulfill its own core sovereign responsibilities. These cases recognize that the failure to extend full faith and credit under such circumstances has an adverse effect on principles of cooperative federalism.

In *Guarini v. New York*, 521 A.2d 1362 (N.J. Super. Ct.), *aff'd*, 521 A.2d 1294, 1366-67 (N.J. Super. Ct. App. Div. 1986), *cert. denied*, 484 U.S. 817 (1987), New Jersey claimed that the Statue of Liberty and the island on which it is located were under its jurisdiction and sovereignty. New York had exercised jurisdiction over the statue and the island for at least 150 years. New Jersey sued the State of New York in a New Jersey court, but the New Jersey court dismissed the case in reliance on footnote 24 of *Nevada v. Hall*. *Guarini* held that the "ruling [in *Nevada v. Hall*] did not mean that a state could be sued in another state as a matter of course." *Id.* at 1366. The court dismissed the action based on the threat it posed to the constitutional system of cooperative federalism, including a potential "cascade of lawsuits" by one State's citizens against neighboring States:

> The present case clearly requires a "different analysis" and a "different result." . . . Plaintiff if successful, would clearly interfere with New York's capacity to fulfill its own sovereign responsibility over those two islands in accordance with and as granted by the 1833 compact. Exercise of jurisdiction by this court would thereby pose a "substantial threat to our constitutional system of cooperative federalism."

Ibid.

In *Mejia-Cabral v. Eagleton School, Inc.*, No. 97-2715, 1999 Mass. Super. LEXIS 353 (Mass. Super. Ct. Sept. 15, 1999), plaintiff sued a Massachusetts school in a Massachusetts state court for wrongful death caused by a juvenile delinquent attendee. The State of Connecticut was joined as a third-party defendant under the theory that it negligently placed the juvenile at the school. The Massachusetts court dismissed the State of Connecticut as a defendant, noting that:

> The prospect of one state's court deciding whether another state was negligent in selecting a particular rehabilitation program for a juvenile offender is profoundly troubling, and this court's assertion of jurisdiction over such a claim against the State of Connecticut would pose a "substantial threat to our constitutional system of cooperative federalism." The State of Connecticut makes a compelling argument that this third-party complaint would, if allowed to proceed, "interfere with [Connecticut's] capacity to fulfill its own sovereign obligations" and that recognition of its sovereign immunity is therefore mandatory.

Id. at *6 (citations omitted).

Both *Mejia-Cabral* and *Guarini* acknowledged the lawsuits against Connecticut and New York, respectively, interfered with those States' ability to carry out their sovereign functions. The Massachusetts court in *Mejia-Cabral* acknowledged that allowing the third-party complaint to proceed against the State of Connecticut would "interfere with [Connecticut's] capacity to fulfill its own sovereign obligations." *Ibid.* Similarly, the New Jersey court in *Guarini* acknowledged that if the plaintiff prevailed in the lawsuit, that result "would clearly interfere with New York's capacity to fulfill its own sovereign responsibility." *Guarini*, 521 A.2d at 1366-67.

Both courts also recognized that it was this *interference* with a State's capacity to fulfill its *sovereign responsibilities* that posed the substantial threat to constitutionally-based cooperative federalism. Finally, both courts concluded that these threats to cooperative federalism were unacceptable; they clearly recognized the need to remedy threats to our constitutional system of cooperative federalism. A similar threat to cooperative federalism

exists in the present case; it is this threat that is the justification for the effect-based rule that California asks this Court to adopt.

B. The Nevada State Court Is Required to Extend Full Faith and Credit to California's Immunity Statutes in This Case Because Its Refusal to Do So Would Interfere with California's Capacity to Fulfill its Own Core Sovereign Responsibilities

California has established above that full faith and credit requires the adoption of the rule that a forum State may not refuse to extend full faith and credit to the legislatively immunized acts of a sister State when such a refusal interferes with the sister State's capacity to fulfill its own core sovereign responsibilities. When this case is examined under the rule, it is clear that Nevada courts must extend full faith and credit to California's immunity laws because (1) California's conduct of the Hyatt residency tax audit is a *core sovereign responsibility*, and (2) Nevada's refusal to extend full faith and credit to California's immunity statutes *interfered* with California's capacity to fulfill its core sovereign responsibilities.

1. California's Rule Applies in This Case Because the FTB's Conduct of the Hyatt Residency Tax Audit Is a Core Sovereign Responsibility

The power to tax is the most essential sovereign power of a state because it is the means by which government is able to function. Exercise of this power is unquestionably a core sovereign responsibility. "'[T]axes are the life-blood of government.'" *Franchise Tax Board v. United*

States Postal Serv., 467 U.S. 512, 523 (1984) (quoting *Bull v. United States*, 295 U.S. 247, 259 (1935)). This Court has recognized "'the imperative need of a State to administer its own fiscal operations'" and that little is "'so important a local concern as the collection of taxes.'" *Franchise Tax Board v. Alcan Aluminum Ltd.*, 493 U.S. 331, 338 (1990). Although there is no clear definition of what constitutes a core sovereign responsibility, the cases cited above underscore the vital nature of the collection of state taxes, and the administration of state tax laws. Indeed, it is fair to say that California's income tax laws and its laws for the administration of income taxes are fundamental to its fiscal integrity. It is difficult, in fact, to imagine a more core sovereign responsibility than the administration of a tax system and the collection of taxes thereunder.

The notion that state taxes are too important to the States to be interfered with by outside influences is further underscored by the fact that Congress has enacted the Tax Injunction Act (28 U.S.C. § 1341), which recognizes that the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 102-03 (1981).[14]

The determination of residency is a foundational step in the collection of state personal income taxes. Here, all of the FTB's acts were performed as a part of the determination of

[14] For example: *California v. Grace Brethren Church*, 457 U.S. 393, 408-11 (1982), recognized the importance of tax administration to local government when it upheld the dismissal of a plaintiff's action pursuant to the Tax Injunction Act on the grounds, *inter alia*, that tax collection constitutes an important local concern of the State.

residency, and thus were undertaken as part of the State of California's inherent sovereign responsibility and power to assess and collect taxes. The process used by California is typical and reasonable given the nature of Hyatt's residency claims.[15] Any reasonable long-time California resident who claims to move to Nevada at virtually the instant he realizes $40 million in income should expect that California would use the normal procedures at its disposal to ascertain the validity of the alleged change of residence.

No State can effectively carry out its tax administration functions without being able to freely review and investigate taxpayer's claims, even when they involve a claimed change of residency. Where the claimed events allegedly take place outside of the State, effective review and investigation necessarily involves some out-of-state review; however, the out-of-state investigation and review is also a core sovereign function. Here, California would have neglected its sovereign responsibility had it not undertaken some investigation in Nevada of Hyatt's alleged new residence. Full faith and credit must require the Nevada courts to apply California's governmental immunity laws regarding tax administration and collection to the entirety of the FTB's conduct, including its conduct in Nevada.[16]

[15] The Nevada Supreme Court originally found that "the myriad of depositions and documents submitted to the court are undisputed and indicate that Franchise Tax Board's investigative acts were in line with a standard to determine residency status for taxation pursuant to its statutory authority." Pet.App. at pp. 42-43.

[16] It is worth repeating that the conduct in Nevada was minimal. The FTB auditor only made two short trips to Nevada and sent correspondence from California to third parties in Nevada in an

(Continued on following page)

2. California's Rule Applies in This Case Because Nevada Interfered with California's Capacity to Conduct the Hyatt Residency Tax Audit

It is clear that Nevada's refusal to extend full faith and credit to California's tax immunity statutes interfered with California's ability to carry out its core sovereign responsibility to assess and collect taxes. California has a comprehensive tax system that balances revenue collection with taxpayer protections: on the one side it protects taxpayers by (1) permitting administrative review of tax assessments[17], (2) establishing a taxpayer's cause of action for a tax agency's failure to follow published procedures[18], and (3) allowing *de novo* judicial review of administrative tax determinations upon payment of the tax.[19] On the other side, however, it provides protection to the State, its agencies, officials and employees by providing specified

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attempt to verify the truth of Hyatt's claims regarding his alleged relocation to Nevada. This contact in Nevada is insignificant in comparison to the hundreds of hours of audit time expended in California. JA at pp. 236-237. In fact, the Nevada court noted that ninety-seven percent of the conduct complained about occurred *outside* the forum State of Nevada. JA at pp. 236-237.

[17] Hyatt still has a full slate of administrative remedies available to him including: a complete review of the tax assessment at the protest stage (Cal. Rev. & Tax. Code §§ 19041, 19044); and, an independent administrative review by the five-member State Board of Equalization (Cal. Rev. & Tax. Code §§ 19045-47).

[18] Cal. Rev. & Tax. Code § 21021.

[19] In fact, when the issue is residency – as it is here – once a taxpayer exhausts his administrative review, he is entitled to file a lawsuit seeking declaratory relief as to his residence *without* the necessity of prepaying the tax. Cal. Rev. & Tax. Code § 19381; Cal. Civ. Proc. Code § 1060.5.

immunities in connection with the administration of the tax system and the collection of taxes. This tax system reflects the California legislature's best efforts to achieve the proper balance.

The general effect of Nevada's refusal to give full faith and credit to California's immunities is to skew the tax system; thus, Hyatt retains all the benefits provided under California law, but Nevada has relieved him of the burdens. The effect of this is to *interfere* with California's capacity to assess and collect taxes. In addition, Nevada's refusal to extend full faith and credit has deprived California of reasonable reliance on an immunity statute that specifically protects its ability to enforce state tax laws.

More specifically, Nevada's refusal to give full faith and credit to California's immunities will interfere with the FTB's residency audit program, the conduct of which is a core sovereign responsibility. As part of the residency audit of Hyatt, the FTB disclosed minimal identifying information about him to others in order to determine his residency under California law. J.A. at pp. 181-191. Hyatt claims he was injured by these disclosures; however, California is immune from liability for these injuries under California Government Code § 860.2. By refusing to extend full faith and credit, Nevada has exposed the FTB's residency audit processes to both the additional legal expenses from protracted, out-of-state tort litigation, as well as potentially unlimited damages. This exposure to unlimited liability will necessarily have a chilling effect upon residency audits, which often require consulting third party sources and making minimal information disclosures out of state. Thus, by refusing to extend full faith and credit, the Nevada courts have interfered with the FTB's entire residency audit program.

Furthermore, the Nevada courts have directly, and knowingly, interjected themselves into California's administrative process. The Discovery Commissioner held variously that:

1. "[T]he entire process of the FTB audits of Hyatt, including the FTB assessments of taxes and the protests, is at issue in the case and a proper subject of discovery. . . . " JA at p. 133.

2. "[T]he process of FTB audits directed at Hyatt is squarely at issue in this case." JA at p. 133.

3. "[T]he process . . . is fair game . . . and if you think otherwise you will have to have the judge say that. . . . [T]he process is what is under attack here. . . . " JA at p. 133.

The protective order, issued by the trial court, and left in place by the Nevada Supreme Court (Pet.App. at pp. 22-35), blocks normal access to information relevant to the underlying tax assessments by denying material produced in this litigation to the California administrative process. The Nevada court's protective order dictates the mechanics of how California can use its own statutory power to obtain information in a tax audit by requiring a notice and demand procedure not contained in California law. California's normal practice of reviewing tax matters, which requires the exhaustion of administrative remedies, has been effectively bypassed. The ruling of the Nevada Supreme Court rejects California's recognized claims of privilege, including the attorney-client privilege, and

interposes Nevada's interpretation of such privileges. JA at pp. 135-146. And none of these intrusions include the toll on FTB employees and resources.[20]

Finally, if extrapolated, it is clear that the widespread application of the rule set down by the Nevada Supreme Court could (and perhaps would) interfere with (and likely cripple) the States' ability to conduct any number of various programs that are vital to state interests, each of which is a core sovereign responsibility. In order to ensure that this does not occur, and to protect the balance inherent in our Constitution's system of cooperative federalism, it is important that this Court affirm that full faith and credit applies in this case.

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[20] The Nevada District Court allowed the deposition of 24 witnesses, mostly FTB employees who were not involved at all with the Hyatt audit. These depositions totaled 315 hours of testimony and 11,000 pages of transcripts, and included 340 demands for documents made of deposed witnesses, and 5 separate voluminous written document demands which included 329 individual document demands, for which the FTB produced 17,514 pages of documents. Record of Proceedings at Volume 3, Item 11, Exhibit 8, pp. 420-422.

CONCLUSION

Based on the foregoing reasons, Petitioner respectfully requests that this Court reverse the April 4, 2002 order of the Nevada Supreme Court and order that this case be dismissed and the protective order vacated.

Respectfully submitted,

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United States Constitution

Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof.

California Code of Civil Procedure

§ 1060.5. Action by one claiming to be nonresident for income tax purposes

Any individual claiming to be a nonresident of the State of California for the purposes of the Personal Income Tax Law may commence an action in the Superior Court in the County of Sacramento, or in the County of Los Angeles, or in the City and County of San Francisco, against the Franchise Tax Board to determine the fact of his or her residence in this state under the conditions and circumstances set forth in Section 19381 of the Revenue and Taxation Code.

California Government Code

§ 860.2. Injuries caused by proceedings or application of laws

Neither a public entity nor a public employee is liable for an injury caused by:

(a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax.

(b) An act or omission in the interpretation or application of any law relating to a tax.

California Government Code

§ 905.2. Claims for money or damages against state

There shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part all claims for money or damages against the state:

(a) For which no appropriation has been made or for which no fund is available but the settlement of which has been provided for by statute or constitutional provision.

(b) For which the appropriation made or fund designated is exhausted.

(c) For money or damages (1) on express contract, or (2) for an injury for which the state is liable.

(d) For which settlement is not otherwise provided for by statute or constitutional provision.

California Government Code

§ 911.2. Time of presentation of claims; limitation

A claim relating to a cause of action for death or for injury to person or to personal property or growing crops shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than six months after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) of this chapter

not later than one year after the accrual of the cause of action.

California Government Code

§ 945.4. Necessity of written claim acted upon by board or deemed to have been rejected

Except as provided in Sections 946.4 and 946.6, no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board, in accordance with Chapters 1 and 2 of Part 3 of this division.

California Revenue & Taxation Code

§ 17001. Short title

This part is known and may be cited as the "Personal Income Tax Law."

California Revenue & Taxation Code

§ 17014. Resident

(a) "Resident" includes:

(1) Every individual who is in this state for other than a temporary or transitory purpose.

(2) Every individual domiciled in this state who is outside the state for a temporary or transitory purpose.

(b) Any individual (and spouse) who is domiciled in this state shall be considered outside this state for a temporary or transitory purpose while that individual:

(1) Holds an elective office of the government of the United States, or

(2) Is employed on the staff of an elective officer in the legislative branch of the government of the United States as described in paragraph (1), or

(3) Holds an appointive office in the executive branch of the government of the United States (other than the armed forces of the United States or career appointees in the United States Foreign Service) if the appointment to that office was by the President of the United States and subject to confirmation by the Senate of the United States and whose tenure of office is at the pleasure of the President of the United States.

(c) Any individual who is a resident of this state continues to be a resident even though temporarily absent from the state.

(d) For any taxable year beginning on or after January 1, 1994, any individual domiciled in this state who is absent from the state for an uninterrupted period of at least 546 consecutive days under an employment-related contract shall be considered outside this state for other than a temporary or transitory purpose.

(1) For purposes of this subdivision, returns to this state, totaling in the aggregate not more than 45 days during a taxable year, shall be disregarded.

(2) This subdivision shall not apply to any individual, including any spouse described in paragraph (3), who

has income from stocks, bonds, notes, or other intangible personal property in excess of two hundred thousand dollars ($200,000) in any taxable year in which the employment-related contract is in effect. In the case of an individual who is married, this paragraph shall be applied to the income of each spouse separately.

(3) Any spouse who is absent from the state for an uninterrupted period of at least 546 consecutive days to accompany a spouse who, under this subdivision, is considered outside this state for other than a temporary or transitory purpose shall, for purposes of this subdivision, also be considered outside this state for other than a temporary or transitory purpose.

(4) This subdivision shall not apply to any individual if the principal purpose of the individual's absence from this state is to avoid any tax imposed by this part.

California Revenue & Taxation Code

§ 17015. Nonresident

"Nonresident" means every individual other than a resident.

California Revenue & Taxation Code

§ 17016. Presumption of residence; rebuttal

Every individual who spends in the aggregate more than nine months of the taxable year within this State shall be presumed to be a resident. The presumption may be overcome by satisfactory evidence that the individual is in the State for a temporary or transitory purpose.

California Revenue & Taxation Code

§ 19041. Protest against proposed deficiency assessment; time; contents

(a) Within 60 days after the mailing of each notice of proposed deficiency assessment the taxpayer may file with the Franchise Tax Board a written protest against the proposed deficiency assessment, specifying in the protest the grounds upon which it is based.

(b) Any protest filed with the Franchise Tax Board on or before the last date specified for filing that protest by the Franchise Tax Board in the notice of proposed deficiency assessment (according to Section 19034) shall be treated as timely filed.

(c) The amendments made by the act adding this subdivision [FN1] shall apply to any notice mailed after December 31, 1999.

California Revenue & Taxation Code

§ 19044. Protest; reconsideration of assessment; hearing

(a) If a protest is filed, the Franchise Tax Board shall reconsider the assessment of the deficiency and, if the taxpayer has so requested in his or her protest, shall grant the taxpayer or his or her authorized representatives an oral hearing. Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a hearing under this subdivision.

(b) The Franchise Tax Board may act on the protest in whole or in part. In the event the Franchise Tax Board acts on the protest in part only, the remaining part of the

protest shall continue to be under protest until the Franchise Tax Board acts on that part.

California Revenue & Taxation Code

§ 19045. Protest; finality of action; time for appeal

(a) The Franchise Tax Board's action upon the protest, whether in whole or in part, is final upon the expiration of 30 days from the date when it mails notice of its action to the taxpayer, unless within that 30-day period the taxpayer appeals in writing from the action of the Franchise Tax Board to the board.

(b)(1) The Franchise Tax Board's notice of action upon protest shall include the date determined by the Franchise Tax Board as the last day on which the taxpayer may file an appeal with the board.

(2) Any appeal to the board filed by the taxpayer on or before the date for filing an appeal specified in the notice (pursuant to paragraph (1)) shall be treated as timely filed.

(c) This section shall apply to any notice mailed after December 31, 1999.

California Revenue & Taxation Code

§ 19046. Appeal to Board of Equalization; addressing and mailing

Two copies of the appeal and two copies of any supporting documents shall be addressed and mailed to the State Board of Equalization at Sacramento, California. Upon receipt of the appeal, the board shall provide one copy of the appeal and one copy of any supporting

documents to the Franchise Tax Board at Sacramento, California.

California Revenue & Taxation Code

§ 19047. Appeal; hearing and determination; notice

The board shall hear and determine the appeal and thereafter shall forthwith notify the taxpayer and the Franchise Tax Board of its determination and the reasons therefor.

California Revenue & Taxation Code

§ 19381. Equitable process against assessment or collection; action to determine residence; stay of tax based upon residence

No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this state or against any officer of this state to prevent or enjoin the assessment or collection of any tax under this part; provided, however, that any individual after protesting a notice or notices of deficiency assessment issued because of his or her alleged residence in this state and after appealing from the action of the Franchise Tax Board to the State Board of Equalization, may within 60 days after the action of the State Board of Equalization becomes final commence an action, on the grounds set forth in his or her protest, in the Superior Court of the County of Sacramento, in the County of Los Angeles or in the City and County of San Francisco against the Franchise Tax Board to determine the fact of his or her residence in this state during the year or years set forth in the notice or notices of deficiency assessment. No tax based solely upon the residence of such

an individual shall be collected from that individual until 60 days after the action of the State Board of Equalization becomes final and, if he or she commences an action pursuant to this section, during the pendency of the action, other than by way of or under the jeopardy assessment provisions of this part.

California Revenue & Taxation Code

§ 19501. Administration and enforcement; creation of districts; branch offices

The Franchise Tax Board shall administer and enforce Part 10 (commencing with Section 17001), Part 10.7 (commencing with Section 21001), Part 11 (commencing with Section 23001), and this part. For this purpose, it may divide the state into a reasonable number of districts, in each of which a branch office or offices may be maintained during all or part of the time as may be necessary.

California Revenue & Taxation Code

§ 19504. Examination of books and papers; oral examination of taxpayer and witnesses; subpoenas

(a) The Franchise Tax Board, for the purpose of administering its duties under this part, including ascertaining the correctness of any return; making a return where none has been made; determining or collecting the liability of any person in respect of any liability imposed by Part 10 (commencing with Section 17001), Part 11 (commencing with Section 23001), or this part (or the liability at law or in equity of any transferee in respect of that liability); shall have the power to require by demand, that an entity of any kind including, but not limited to, employers, persons, or financial institutions provide

information or make available for examination or copying at a specified time and place, or both, any book, papers, or other data which may be relevant to that purpose. Any demand to a financial institution shall comply with the California Right to Financial Privacy Act set forth in Chapter 20 (commencing with Section 7460) of Division 7 of Title 1 of the Government Code. Information which may be required upon demand includes, but is not limited to, any of the following:

(1) Addresses and telephone numbers of persons designated by the Franchise Tax Board.

(2) Information contained on Federal Form W-2 (Wage and Tax Statement), Federal Form W-4 (Employee's Withholding Allowance Certificate), or State Form DE-4 (Employee's Withholding Allowance Certificate).

(b) The Franchise Tax Board may require the attendance of the taxpayer or of any other person having knowledge in the premises and may take testimony and require material proof for its information and administer oaths to carry out this part.

(c) The Franchise Tax Board may issue subpoenas or subpoenas duces tecum, which subpoenas must be signed by any member of the Franchise Tax Board and may be served on any person for any purpose.

(d) Obedience to subpoenas or subpoenas duces tecum issued in accordance with this section may be enforced by application to the superior court as set forth in Article 2 (commencing with Section 11180) of Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code.

(e) When examining a return, the Franchise Tax Board shall not use financial status or economic reality

examination techniques to determine the existence of unreported income of any taxpayer unless the Franchise Tax Board has a reasonable indication that there is a likelihood of unreported income.

(f) The amendments made by the act adding this subdivision shall apply to any examination beginning on or after the effective date of this act.

California Revenue & Taxation Code

§ 21021. Action by taxpayer aggrieved by action or omission by officer or employee in reckless disregard of published procedures; amount of damages; frivolous position; penalty

(a) If any officer or employee of the board recklessly disregards board published procedures, a taxpayer aggrieved by that action or omission may bring an action for damages against the State of California in superior court.

(b) In any action brought under subdivision (a), upon a finding of liability on the part of the State of California, the state shall be liable to the plaintiff in an amount equal to the sum of all of the following:

(1) Actual and direct monetary damages sustained by the plaintiff as a result of the actions or omissions.

(2) Reasonable litigation costs, as defined for purposes of Sections 19420 and 26491. [FN1]

(c) In the awarding of damages under subdivision (b), the court shall take into consideration the negligence or omissions, if any, on the part of the plaintiff which contributed to the damages.

(d) Whenever it appears to the court that the taxpayer's position in the proceedings brought under subdivision (a) is frivolous, the court may impose a penalty against the plaintiff in an amount not to exceed ten thousand dollars ($10,000). A penalty so imposed shall be paid upon notice and demand from the board and shall be collected as a tax imposed under Part 10 (commencing with Section 17001) or Part 11 (commencing with Section 23001).

Title 18 California Code of Regulations § 17014 (1988)

Who Are Residents and Nonresidents.

The term "resident," as defined in the law, includes (1) every individual who is in the State for other than a temporary or transitory purpose, and (2) every individual who is domiciled in the State who is outside the State for a temporary or transitory purpose. All other individuals are nonresidents.

Under this definition, an individual may be a resident although not domiciled in this State, and, conversely, may be domiciled in this State without being a resident. The purpose of this definition is to include in the category of individuals who are taxable upon their entire net income, regardless of whether derived from sources within or without the State, all individuals who are physically present in this State enjoying the benefit and protection of its laws and government, except individuals who are here temporarily, and to exclude from this category all individuals who, although domiciled in this State, are outside this State for other than temporary or transitory purposes, and, hence, do not obtain the benefits accorded by the laws and Government of this State.

If an individual acquires the status of a resident by virtue of being physically present in the State for other than temporary or transitory purposes, he remains a resident even though temporarily absent from the State. If, however, he leaves the State for other than temporary or transitory purposes, he thereupon ceases to be a resident.

If an individual is domiciled in this State, he remains a resident unless he is outside of this State for other than temporary or transitory purposes.

No. 02-42

JAN 24 2003

CLERK

IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT and EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Nevada

BRIEF FOR RESPONDENT GILBERT P. HYATT

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QUESTION PRESENTED

Whether the Full Faith and Credit Clause requires the Nevada state courts to apply California immunity law, rather than Nevada law, to tort claims alleging intentional misconduct against a Nevada citizen in Nevada, even though Nevada has substantive lawmaking authority over the subject matter of the lawsuit.

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Respondents.

On Writ of Certiorari to the Supreme Court of the State of Nevada

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BRIEF FOR RESPONDENT GILBERT P. HYATT

STATEMENT

The issues in this case arise out of a tort suit brought by respondent Hyatt, a Nevada citizen, in Nevada state court against petitioner Franchise Tax Board of the State of California (the "Board" or "FTB"). In a motion for summary judgment seeking dismissal of all claims, the Board asserted, among other defenses, that the Full Faith and Credit Clause, U.S. Const., art. IV, § 1, compelled the Nevada courts to apply California law to the claims, in particular California law that allegedly shields the Board from liability for both negligent and intentional torts. The state district court denied the motion. On a petition for

mandamus filed by the Board, the Nevada Supreme Court decided, on grounds of comity, to apply California immunity law to the negligence claim, Pet. App. 11-12, but declined to apply California immunity law to the intentional tort claims. Pet. App. 12-13. Noting that Nevada law does not immunize Nevada officials from liability for intentional torts, the court concluded that application of California law to deny redress to injured Nevada plaintiffs would "contravene Nevada's policies and interests in this case." Pet. App. 12.

This tort suit is one of two continuing disputes between respondent and the Board. The other dispute involves a residency tax audit initiated by the Board in 1993 with respect to the 1991 and 1992 tax years. The principal issue in that underlying tax matter turns on the date that respondent, a former California resident, became a permanent resident of Nevada. Respondent contends that he became a Nevada resident in late September 1991, shortly before he received significant licensing income—on behalf of and under contract to U.S. Philips Corporation—from certain patented inventions.[1] For its part, the Board has concluded that respondent became a resident of Nevada six months later. The administrative proceedings relating to this six month dispute are being conducted in California, and are ongoing. *See* FTB Br. at 4.

This suit, in turn, concerns various tortious acts committed by the Board, including fraud, outrageous conduct, disclosure of confidential information, and invasion of privacy. *See generally* Pet. App. 49-90 (First Amended Complaint); J.A. 246-66 (Petition for Rehearing); J.A. 267-97 (Supplement to Petition

[1] In suggesting (FTB Br. 3) that the 1991 income in dispute amounts to "$40 million," the Board simply disregards the fact that respondent collected licensing income on behalf of U.S. Philips. The correct figure is less than half that ($17,727,743). *See* Cowan Affidavit Exh. 16 (Hyatt Appendix, Vol. VIII, Exh. 15) (Notice of Proposed Assessment). ("Hyatt Appendix" refers to appendices submitted to the Nevada Supreme Court in connection with the first petition for a writ of mandamus.)

for Rehearing). The evidence introduced at the summary judgment stage shows that Board auditor Sheila Cox, as well as other employees of the Board, went well beyond legitimate bounds in their attempts to extort a tax settlement from Mr. Hyatt. This bad-faith effort relied on two primary courses of action. The first was to create a huge potential tax charge against respondent, largely by making false and unsupported claims and then embellishing them with the threat of large penalties. The second was to put pressure on respondent to settle the inflated claims by, among other things, releasing confidential information, while informing respondent that resistance to settlement would lead to a further loss of privacy and to public exposure.

The Board undertook this campaign against respondent after the State of California urged its tax officials to increase revenues in order to alleviate a pressing financial crisis. *See* J.A. 13 ("the demands for performance and efficiency in revenue production are higher than they have ever been"); *see also id.* 9-13, 15. Auditors knew that prosecution of large tax claims would provide recognition and an opportunity for advancement within the department. *See generally* J.A. 157-58. Indeed, large assessments, in and of themselves, would be advantageous, because the department evaluated its performance by the amount of taxes assessed. Some evidence suggests that California tax officials especially targeted wealthy taxpayers living in Nevada. *See* J.A. 174-75.

The Board also had a policy of using the threat of penalties to coerce settlements. *See* J.A. 164-67, 178-80. A memorandum regarding tax penalties, in fact, placed a picture of a skull and crossbones on its cover. *See* J.A. 16. A former Board employee testified in a deposition that a California tax official showed auditors how to use threatened penalties as "big poker chips" to "close audits" with taxpayers. *See* J.A. 165, 166. The largest, most severe penalty, and thus the biggest chip, was the seldom imposed penalty for fraud. *See* J.A. 158, 177-78.

Against this background Sheila Cox set her sights on Mr. Hyatt. As the evidence shows, her attempts to pursue a tax claim against Mr. Hyatt were, by any measure, extraordinary and offensive. *See* J.A. 161 (auditor Cox "created an entire fiction about [respondent]"). Referring to respondent, the auditor declared that she was going to "get that Jew bastard." J.A. 148, 168. According to evidence from a former Board employee, the auditor freely discussed information about respondent - - much of it false—with persons within and without the office. *See* J.A. 148-52. That information included, among other things, details about members of his family, his battle with colon cancer, a woman that the Board claimed to be his girlfriend, and the murder of his son. *See, e.g.*, J.A. 148, 168, 169, 170, 176; 283. The auditor also committed direct invasions of respondent's privacy. She sought out respondent's Nevada home, *see* J.A. 153, 174, 176, and looked through his mail and his trash. *See* J.A. 172. In addition, she took a picture of one of her colleagues posed in front of the house. *See* J.A. 44, 171. Her incessant discussion of the investigation eventually led the colleague to conclude that she was "obsessed" with the case. *See* J.A. 157.

Within her department Ms. Cox pressed for harsh action, including imposition of the rare fraud penalties. *See* J.A. 161, 162. To bolster this effort, she enlisted respondent's ex-wife and estranged members of respondent's family. *See* J.A. 150, 159. Reflecting her obsession, she created a story about being watched by a "one-armed" man and insisted that associates of Mr. Hyatt were mysterious and threatening. *See* J.A. 151, 152, 161-62. She repeatedly spoke disparagingly about respondent and his associates. *See* J.A. 148, 152, 169-70.

The Board also repeatedly violated its promises of confidentiality, both internally and externally. *See, e.g.*, J.A. 149-50. Although Board auditors had agreed to protect information submitted by respondent in confidence, the Board bombarded people with information "Demand[s]" about respondent and disclosed his address and social security number

to third parties, *see* J.A. 19-43, including California and Nevada newspapers. *See* J.A. 34-36, 39-40, 40-43. Demands to furnish information, naming respondent as the subject, were sent to his places of worship. *See* J.A. 24-27, 29-30. The Board also disclosed its investigation of respondent to respondent's patent licensees in Japan. *See* J.A. 256-57.

The Board was well aware that respondent, like many private inventors, had highly-developed concerns about privacy and security. *See* J.A. 175, 197-206. Far from giving these concerns careful respect, the Board sought to use them against him. In addition to the numerous information "Demand[s]" sent by the Board to third parties, one Board employee pointedly told Eugene Cowan, an attorney representing respondent, that "most individuals, particularly wealthy or famous individuals, compromise and settle with the FTB to avoid publicity, to avoid the individual's financial information becoming public, and to avoid the very fact of the dispute with the FTB becoming public." J.A. 212. In Mr. Cowan's view, "[t]he clear import of her suggestion was that famous, wealthy individuals settle with the FTB to avoid being, rightly or wrongly, branded a 'tax dodger.'" J.A. 212.

These deliberate acts caused significant damage to respondent's business and reputation. Because of the tortious Board actions, the royalty income received by respondent from new licensees "dropped to zero." J.A. 257.

Respondent brought suit against the Board in Nevada state court, alleging both negligent and intentional torts.[2] The Board sought summary judgment, arguing, *inter alia*, that the Full Faith and Credit Clause, U.S. Const., art IV, § 1, required the Nevada courts to apply California law and that, as a result, the

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[2] In addition to his claims for damages, respondent sought a declaratory judgment that he had become a Nevada resident effective as of September 26, 1991. *See* Pet. App. 62-65. The district court dismissed this claim, and it is no longer part of the case.

Board was immune from liability for all claims. The Nevada trial court rejected this defense, as well as defenses of sovereign immunity and comity, without opinion.

The Board then sought a writ of mandamus from the Nevada Supreme Court, asking that the court order dismissal of the action "for lack of subject matter jurisdiction" or, alternatively, that it limit the action to what the Board termed "the FTB's Nevada acts and Nevada contacts concerning Hyatt." FTB Petition for Mandamus at 43. The Nevada Supreme Court initially granted a writ of mandamus directing the district court to enter summary judgment in favor of the Board, Pet. App. 38-44, concluding (on a ground neither asserted by the Board nor briefed by the parties) that respondent had not presented sufficient evidence to support his claims. Respondent sought rehearing, citing extensive evidence from the record that the Board had committed numerous negligent and intentional torts. *See* J.A. 246-97. After reviewing that evidence, the supreme court granted rehearing and vacated its prior order. *See* Pet. App. 6-7.

The Nevada Supreme Court then addressed whether the district court should have applied California law, reaching different conclusions based on the nature of respondent's claims. With respect to the one negligence claim made against the Board, the supreme court decided that "the district court should have refrained from exercising its jurisdiction . . . under the comity doctrine . . . ." Pet. App. 11. While the court found that "Nevada has not expressly granted its state agencies immunity for all negligent acts," Pet. App. 12, it noted that "Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused." Pet. App. 12. It thus concluded that "affording Franchise Tax Board statutory immunity [under California law] for negligent acts does not contravene any Nevada interest in this case." Pet. App. 12.

The Nevada Supreme Court declined, however, to apply California immunity law to respondent's intentional tort claims. With respect to the full faith and credit argument, the court first observed that "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." Pet. App. 10. It then determined that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." Pet. App. 12. The court pointed out that "Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment." Pet. App. 12. Against this background, the court declared that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." Pet. App. 12-13.[3]

SUMMARY OF ARGUMENT

I. This Court has held that "[t]he Full Faith and Credit Clause does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (internal quotation marks omitted). This longstanding respect for the States' traditional lawmaking authority directly reflects the fact that each State retains 'a residuary and inviolable sovereignty," *Printz v. United States*, 521 U.S. 898, 919 (1997) (internal quotation marks omitted), which includes the sovereign power to address harms occurring within its borders. While a State should properly take account of the interests of its sister States, the fact remains that full faith

[3] In its decision the Nevada Supreme Court apparently assumed that California law, if applicable, would provide immunity for the tortious acts committed by the Board. Pet. App. 10-13. *But see* pages 36-37 *infra* (discussing California law).

and credit doctrine does not "enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 504-05 (1939). This principle holds even when the law of the sister State would provide immunity for its actions within the forum State. *See Nevada v. Hall*, 440 U.S. 410, 423-24 (1979).

The State of Nevada plainly was "competent to legislate" with respect to the torts at issue in this case. To meet that standard, a "State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985). Here, Nevada was both the State in which the injuries to respondent took place, *see Carroll v. Lanza*, 349 U.S. 408, 413 (1955), and the State in which respondent was a citizen at the time that the tortious conduct causing his injuries occurred. Moreover, Nevada has significant contacts with the defendant in this case: the Board not only engaged in improper actions that took place directly within Nevada, it conducted a broad tortious scheme that was specifically intended to have its harmful effects there. Nothing in the Full Faith and Credit Clause bars Nevada from applying its own law to that wrongdoing. In doing so, however, the State made a point of treating California as a co-equal sovereign, specifically examining whether Nevada would be liable for similar actions by its own officials and deciding to defer to California law, as a matter of comity, where it would not.

II. The Court should decline to adopt the "new" full faith and credit rule proposed by the Board. This rule—which would bar application of forum law "to the legislatively immunized acts of a sister State" when that law "interferes with the sister State's capacity to fulfill its own core sovereign responsibilities"—would work a wholly unjustified change in the States'

recognized legislative authority within our federal system. *See Bonaparte v. Tax Court*, 104 U.S. 592 (1881). Here, Nevada has decided that the interests in compensating injured tort victims and deterring intentional wrongdoing outweigh the benefits of providing immunity to state agencies, yet the proposed "new rule" would force Nevada to make the opposite choice, simply because California (the defendant in its courts) has done so. This preemption of Nevada law is directly contrary to the basic allocation of lawmaking authority among the several States. *See FERC v. Mississippi*, 456 U.S. 742, 761 (1982) ("having the power to make decisions and to set policy is what gives the State its sovereign nature").

Nothing in the history of the Full Faith and Credit Clause requires this anomalous result. The relevant debates show that the Framers, in providing for full faith and credit, were primarily concerned with the subject of inter-State respect for *judgments* —where the force of the Clause is considerably greater, *see Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232-33 (1998)—and the brief discussion regarding other States' *laws* was largely addressed to the issue of congressional power to declare their "effect." This lack of scrutiny to state laws was reinforced by the fact that Congress subsequently enacted legislation specifying the effect of judgments, but not of "public Acts." Similarly, the decisions of this Court, while not always charting a straight path, have now established that the Clause does not strip States of the fundamental authority to apply their own law regarding matters about which they are competent to legislate.

The "new rule" would also raise largely unanswerable questions about interpretation and application. These problems start with the very premise of the rule: although the Board asks this Court to declare that the interest in legislatively conferred sovereign immunity for one State always outweighs another State's interest in protecting its citizens, it offers no judicially cognizable basis for making that constitutional value judgment.

Furthermore, the rule would require essentially standardless determinations about what are "core sovereign responsibilities"—the Board itself admits that "there is no clear definition of what constitutes a core sovereign responsibility" (FTB Br. 32)—and what might "interfere" with a State's "capacity to fulfill" them. To apply the proposed rule would thus lead to just the sort of subjective, unguided decisions that led this Court to abandon the now-discredited "balancing test" in full faith and credit analysis.

It is not apparent, in fact, how the rule would be applied even in this case. Although the Board claims that it needs immunity in order to conduct its tax collection activities, it must acknowledge that, despite the Nevada litigation, the tax proceeding against respondent is continuing without interruption in California. Furthermore, the Nevada Supreme Court has already allowed the Board to assert immunity under California law for negligence and for any good-faith discretionary actions, which would appear to protect virtually all legitimate forms of investigation and enforcement. Other States are able to operate their tax systems without full immunity, and it appears that California itself permits some damage actions against the State for misconduct by its tax officials. *See* Cal. Government Code § 21021. Taking all this into account, it seems implausible for the Board to insist that immunity for intentional torts is critical to effective operation of the California tax system.

Finally, the "new rule" is unnecessary. Principles of comity have long protected States in the courts of other States, and they have continued to do so following the decision in *Nevada v. Hall*. State courts, in fact, have often done what the Nevada courts did here: they have assessed defendant States' claims of sovereign immunity by reference to the immunity of their own States, thereby treating defendant States as co-equal parts of "our constitutional system of cooperative federalism." *Hall*, 440 U.S. at 424 n. 24. Furthermore, if need be, States can obtain additional protection through agreements among

themselves or through legislation by Congress, which retains its express authority to legislate regarding the effect of "public Acts" under the Full Faith and Credit Clause.

III. The Court should reject the invitation of *amici curiae* Florida *et al.* to revisit that part of *Nevada v. Hall* holding that States lack sovereign immunity as of right in the courts of other States. In pressing this question, *amici* seek to raise an issue that is not within the Question Presented in the petition. *See* Pet. i. Rule 14.1(a) of the Rules of this Court precludes consideration of issues not encompassed in the Question Presented except in "the most exceptional cases." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 (1993) (internal quotation marks omitted). This is not such a case.

Amici also have failed to demonstrate a good reason to depart from governing principles of *stare decisis*. *See Hilton v. South Carolina Pub. Rys. Comm'n,* 502 U.S. 197, 202 (1991). Although their entire argument rests upon historical evidence that States accorded immunity to other States at the time of the Convention, this Court has already expressly recognized that fact in *Nevada v. Hall*. The Court also recognized, however, that the States granted this immunity as a matter of comity, not as a matter of absolute right, a fact that *amici* never successfully overcome. And, while *amici* seek to rely on the decision in *Alden v. Maine*, 527 U.S. 706 (1999), the Court in *Alden* explicitly acknowledged the difference between immunity in a sovereign's own courts and immunity in the courts of another sovereign, pointing out that the latter case "'necessarily implicates the power and authority of a second sovereign.'" *Id.* at 738 (quoting *Hall*, 440 U.S. at 416). The Court then reiterated: "the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another . . . ." *Id.* at 738.

ARGUMENT

The Full Faith and Credit Clause does not require the Nevada courts to apply California law (here, its statutory defense of sovereign immunity) to intentional torts committed by California officials to harm a Nevada citizen in Nevada. Although the Clause provides "modest restrictions on the application of forum law," *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985), this Court has made clear that a State need not subordinate its own law with respect to matters about which it is "competent to legislate." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939)). That test is readily satisfied here. The State of Nevada is fully competent to legislate regarding deliberate tortious acts that are intended to, and do, injure its citizens within its borders.

The Board does not actually take issue with this basic conclusion. Its sole argument is that this Court should announce a "new rule" under the Full Faith and Credit Clause barring application of forum law—even law that is unquestionably within the legislative jurisdiction of the forum State—"to the legislatively immunized acts of a sister State" when that law "interferes with the sister State's capacity to fulfill its own core sovereign responsibilities." FTB Br. at 13. But this "new rule" finds no basis in the history of the Full Faith and Credit Clause or in the precedent of this Court. Furthermore, in urging the creation of a novel constitutionally binding rule, the Board takes no account of the substantial protection already afforded to State defendants by the willingness of forum States to treat sister States as equal sovereigns, or of the opportunity for States to gain additional protection either through agreements among themselves or through action by Congress, which is given explicit authority to legislate under the Full Faith and Credit Clause. The "new rule" is thus both unsupported and unnecessary.

I. THE DECISION OF THE NEVADA SUPREME COURT NOT TO APPLY CALIFORNIA IMMUNITY LAW TO THE INTENTIONAL TORT CLAIMS IS PLAINLY CONSTITUTIONAL UNDER ESTABLISHED FULL FAITH AND CREDIT PRINCIPLES.

A. The Full Faith And Credit Clause Allows A State To Apply Its Own Law To A Subject Matter About Which It Is Competent To Legislate

Although the Board rests its entire argument on the Full Faith and Credit Clause, it never acknowledges, much less quotes, the governing full faith and credit standard applied by this Court. Just a few Terms ago, however, this Court reiterated what it has long held: that "[t]he Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232 (1998) (quoting *Pacific Employers*, 306 U.S. at 501); *see Sun Oil*, 486 U.S. at 722 (same). This standard makes clear that, while a forum State may not constitutionally apply its substantive law to matters with which it has only a marginal or inconsequential connection, *see Phillips Petroleum*, 472 U.S. at 818-19, it is free to protect its sovereign interests by applying its law to those matters over which it has legitimate substantive lawmaking authority.

This focus on legislative competence rests upon the recognition of two important principles. The first principle is that, upon formation of the National Government, the States retained "'a residuary and inviolable sovereignty.'" *Printz v. United States*, 521 U.S. 898, 919 (1997) (quoting The Federalist, No. 39, at 245 (J. Madison)). *See Alden v. Maine*, 527 U.S. 706, 713-14 (1999); *Parker v. Brown*, 317 U.S. 341, 359-60 (1943); *Skiriotes v. Florida*, 313 U.S. 69 (1941). As this Court has recently noted, "the founding document 'specifically recognizes the States as sovereign entities,'" *Alden*, 527 U.S. at

713 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.15 (1996)), "reserv[ing] to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden*, 527 U.S. at 714. The Tenth Amendment expressly sets forth that understanding, declaring that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amdt 10. "'These powers . . . remain after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.'" *Cook v. Gralike*, 531 U.S. 510, 519 (2001) (quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819)).

The second principle is that the States are, in considerable part, defined by their territorial limits. "A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." *Texas v. White*, 74 U.S. (7 Wall.) 700, 721 (1869). For the most part, "the jurisdiction of a state is co-extensive with its territory, co-extensive with its legislative power." *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 733 (1838) (internal quotation marks omitted). The sovereignty retained by the States thus leaves them with broad powers to govern with respect to persons and events within those territorial limits. *See Printz*, 521 U.S. at 920 ("[t]he Constitution . . . contemplates that a State's government will represent and remain accountable to its own citizens").

These principles have important consequences for the relations between States in our federal system. This Court has noted the general rule that "[e]very sovereign has the exclusive right to command within his territory . . . ." *Suydam v. Williamson*, 65 U.S. (24 How.) 427, 433 (1860); *see also Healy v. Beer Institute*, 491 U.S. 324, 336 (1989) (recognizing

"autonomy of the individual States within their respective spheres"). Conversely, the Court has acknowledged, again as a general rule, that "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived." *Hilton v. Guyot*, 159 U.S. 113, 163 (1895). As we discuss later in greater detail, the Full Faith and Credit Clause was not meant to, and did not, change this basic division of lawmaking authority among the States. *See* pages 23-29 *infra*. Thus, as this Court has stated, "[f]ull faith and credit does not enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Pacific Employers*, 306 U.S. at 504-05; *see Nevada v. Hall*, 440 U.S. 410, 423-24 (1979).

These principles, taken together, establish that a State has no obligation to subordinate its legitimate interests to the contrary policies of another State. Although a State should always seek to minimize conflicts with the legal rules of another State, and must defer when its own substantive interests are not genuinely implicated, *see Phillips Petroleum*, 472 U.S. at 818, the Full Faith and Credit Clause does not compel one State to favor the interests of another State over its own interests. *See Sun Oil*, 486 U.S. at 727 (noting that "the forum State and other interested States" should have "the legislative jurisdiction to which they are entitled"). Indeed, the contrary rule, as Chief Justice Stone once observed, "would lead to the absurd result that, whenever the conflict [between the laws of two States] arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935). The Court has thus declared that "the Full Faith and Credit Clause does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy." *Carroll v. Lanza*, 349 U.S. 408, 412 (1955).

The Court has held to these fundamental principles even when the "conflicting and opposed policy" is one that provides sovereign immunity to a defendant State. *See Hall*, 440 U.S. at 421-24. Although acknowledging that "in certain limited situations, the courts of one State must apply the statutory law of another State," *id.* at 421, the Court in *Hall* reiterated that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Id.* at 422. In that case, the California courts had chosen to apply California law, providing full redress for injuries incurred within its borders, despite efforts by Nevada to invoke the defense of partial sovereign immunity under Nevada law. *See id.* at 421-24. This Court upheld the right of California to choose its own law, noting that California had a "substantial" interest in granting relief to persons injured within its borders. *See id.* at 424 (quoting App. to Pet. for Cert. vii) ("California's interest is the . . . substantial one of providing 'full protection to those who are injured on its highways through the negligence of both residents and nonresidents'").[4]

B. Nevada Is Competent To Legislate To Redress Harms Inflicted On A Nevada Resident In Nevada.

The central full faith and credit question, then, is whether Nevada was "competent to legislate" regarding the torts that are the subject matter of this lawsuit. To answer that question, it is

[4] The Court in *Hall* noted that the application of California law "pose[d] no substantial threat to our constitutional system of cooperative federalism" and "could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities," 440 U.S. at 424 n.24, adding that it "ha[d] no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result." *Id.* Although the Board attempts to turn this footnote into a new constitutional restriction on the application of forum-state law, its argument is, as we later discuss, ungrounded in either the relevant history or precedent. *See* pages 21-41 *infra*.

necessary to look at the relationship between Nevada and the "persons and events," *Carroll v. Lanza*, 349 U.S. at 412, that are the basis of the several tort claims. At a minimum, "'for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" *Phillips Petroleum*, 472 U.S. at 818 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality opinion)). Those contacts and interests are clearly present in this case.

To start with, and most basically, Nevada is the state in which the plaintiff suffered his injuries. Although the Board has claimed (wrongly) that respondent moved to Nevada after the date that he declared for tax purposes, even the Board cannot dispute that respondent was living in Nevada several years later—at the time of the tortious acts that caused the injuries—and that, indeed, respondent has been living there ever since. This Court has frequently noted the strong legislative interest possessed by a forum State that is also the site of the injury to be redressed. *See Carroll v. Lanza*, 349 U.S. at 413 ("[t]he State where the tort occurs certainly has a concern in the problems following in the wake of the injury"); *International Paper Co. v. Ouellette*, 479 U.S. 481, 502 (1987); *Pacific Employers*, 306 U.S. at 503; *Hall*, 440 U.S. at 423. Pointing out the "constitutional authority of [a] state to legislate for the bodily safety and economic protection of employees injured within it," *Pacific Employers*, 306 U.S. at 503, the Court has observed: "Few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power." *Id.*

This viewpoint is anything but novel or unusual. In tort cases, like this one, traditional conflict-of-laws principles have long placed special emphasis on the law of the place of injury. *See* McDougal, American Conflicts Law § 121 at 449-51 (5th

ed. 2001); Restatement of Conflict of Laws § 377-383 (1934). Chief Judge Posner has recently made the same point, remarking that "[u]nder the *ancien regime* of conflict of laws . . . [t]he rule was simple: the law applicable to a tort suit was the law of the place where the tort occurred, more precisely the place where the last act, namely the plaintiff's injury, necessary to make the defendant's careless or otherwise wrongful behavior actually tortious, occurred." *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 844 (7th Cir. 1999). More modern conflict-of-laws rules likewise give great, if not decisive weight, to the place of injury. *See* McDougal, American Conflicts Law §§ 124-125; Restatement (Second) of Conflict of Laws §§ 145, 146-47, 156-60, 162, 164-66 (1971).

The interest possessed by Nevada as the place of injury is reinforced by the fact that plaintiff was (and is) a Nevada citizen. While residence of the plaintiff is not a necessary point of contact, nor perhaps a sufficient one, *see Allstate Ins.*, 449 U.S. at 318-20 (plurality opinion); *id.* at 331 (Stevens, J., concurring in judgment); *id.* at 337 (Powell, J., dissenting), the connection between the State and its citizens does give Nevada an additional interest in assuring compensation whenever those citizens are injured. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) ("[t]hroughout our history the several States have exercised their police powers to protect the health and safety of their citizens"). Of course, Nevada has a significant legislative interest in the physical and economic well-being of all persons within its borders, and a sovereign right and duty to protect them, but those concerns are stronger still when the injured party is a Nevada citizen *at the time of injury*, and thus more likely to remain in the State afterwards. Furthermore, insofar as the Board may be consciously singling out and targeting Nevada citizens, *see* page 3 *supra*, the State has an obvious interest in taking appropriate measures to assure their freedom from tortious harassment.

These contacts, by themselves, give Nevada a constitutional basis for applying its own law to the torts committed against respondent there. But, in addition, Nevada has significant contacts with the defendant and with its particular acts of misconduct. Although the Board argues as if its actions were only peripherally connected to Nevada, *see* FTB Br. 33-34 n.16, the evidence demonstrates that the Board deliberately took actions that either occurred in Nevada or were specifically intended to have their harmful effects there. *See* pages 2-5 *supra*. Thus, the Board, through its officials, engaged in bad-faith conduct seeking to exact revenues from a particular taxpayer who, it knew, was living in Nevada at the time, repeatedly disclosing confidential information to third parties within and without Nevada. Furthermore, at least one Board official physically invaded respondent's privacy, going to his Nevada house and looking through his mail and trash. These purposeful acts not only supply a basis for exercising personal jurisdiction over the Board, *see Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985),[5] they strengthen Nevada's territorial interest in assuring redress and give rise to important police power concerns about deterrence of wrongful behavior. Whatever the Board may be free to do in California, it cannot take actions in Nevada, or directly affecting Nevada, without becoming subject to the laws of that State. *See generally* Story, *Commentaries on the Conflict of Laws*, §§ 18-19 (2d ed. 1841).[6]

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[5] The Board initially sought to quash the complaint in this case for want of personal jurisdiction, but subsequently withdrew its motion. This case thus raises no question about the rules of personal jurisdiction as they might apply to State defendants.

[6] The Board does not, and could not, claim any expectation that Nevada would recognize complete immunity for its actions. More than a decade before, Nevada had made clear that it would allow compensation for individuals injured by certain acts of sister States, relying in part on the decision in *Nevada v. Hall*. *See Mianecki v. District Court*, 658 P.2d 422, 423-25, *cert. dismissed*, 464 U.S. 806 (1983).

These cumulative interests are more than sufficient to satisfy governing full faith and credit standards. But, in holding that Nevada law should be applied to the intentional tort claims, the Nevada Supreme Court took an additional step: it tailored its analysis to account for the fact that the defendant was a sister State. Thus, to determine whether to defer to California law, the supreme court looked, not to whether Nevada law provides for compensation when the injury is caused by private parties, but whether it does so when the injury is caused by Nevada government officials. Finding that Nevada law barred suits based on the discretionary acts of its own officials, the court concluded that, as a matter of comity, Nevada should apply the comparable California law ostensibly providing immunity for negligent acts of California employees. *See* Pet. App. 11-12. However, because Nevada law did not give absolute immunity to its own officials for intentional torts, the Court went on to conclude that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." Pet. App. 12. More particularly, it decided that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." Pet. App. 12-13.

The Nevada Supreme Court, by engaging in this comparative analysis, thus gave full regard for the fact that California is a sovereign State. In applying full faith and credit principles, its reference point was not the liability of private individuals for tortious conduct, but the liability *of the State itself*. In *Nevada v. Hall*, where the respective position of the two States was reversed, this Court noted with apparent approval that California (the forum State) had looked to its own immunity for similar torts in deciding whether to accord immunity to Nevada (the defendant State) under Nevada law. *See* 440 U.S. at 424. The Full Faith and Credit Clause requires no more.

II. THIS COURT SHOULD DECLINE TO ALTER FULL FAITH AND CREDIT DOCTRINE BY ADOPTING AN UNSUPPORTED NEW CONSTITUTIONAL RULE.

A. The Proposed "New Rule" Is Inconsistent With Full Faith And Credit History And Principles.

The Board dismisses these established full faith and credit principles, arguing that this Court should amend them by adopting a new constitutional rule. This "new rule," however, would work a striking revision of the retained sovereignty of the several States: by requiring immunity for a defendant State, no matter how wrongful its conduct in another State, it would strip away significant legislative authority from the forum States. In the exercise of its lawmaking authority, Nevada has determined that the interests of compensating injured persons and of deterring deliberate wrongdoing are more important than the benefits that might arise from according absolute governmental immunity. *See* Pet. App. 12-13. The "new rule" would order Nevada to make the opposite choice, simply because California (the source of the displacing law) has done so. The result would be to allow California to grant itself a license to act within Nevada's borders without being held accountable under Nevada law.

This redistribution of sovereign power is inconsistent with the most basic understandings of our federal system. That system is based upon a recognition that, having retained all sovereignty not surrendered in the Constitutional plan, *see* pages 13-14 *supra*, the individual States have the sovereign right to decide for themselves how to govern within their territorial boundaries. This Court has observed that "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas*, 441 U.S. 418, 431 (1979); *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). In keeping with that principle, the citizens of a State may decide

that their interests are best served by permitting what other States choose to prohibit, or by prohibiting what other States choose to permit. More particularly, a State may elect to strike a different balance than its neighbors between compensation for individual injury and governmental immunity from liability. "[H]aving the power to make decisions and to set policy is what gives the State its sovereign nature." *FERC v. Mississippi*, 456 U.S. 742, 761 (1982).

This Court has repeatedly acknowledged the importance of this lawmaking power. Indeed, the States' independent legislative role in the federal system is of such stature that, in those areas traditionally subject to state regulation, this Court has adopted a working presumption against preemption of state law. *See, e.g., Medtronic*, 518 U.S. at 485; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Although it is accepted that the Federal Government has broad power to restrict state lawmaking, the Court has nonetheless declared that construction of a federal statute begins "with the assumption that the historic police powers of the States [are] not to be superseded . . . unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Any inquiry into federal preemption of state law is "guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981).

Given this understanding, it would be particularly anomalous to have a newly fashioned constitutional rule mandating preemption of state law *by the law of another State*. This Court has pointed out that "since the legislative jurisdictions of the States overlap, it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another." *Sun Oil*, 486 U.S. at 727; *Phillips Petroleum*, 472 U.S. at 823; *Richards v. United States*, 369 U.S. 1, 15 (1962). It is entirely consistent with that principle, of course, to require a forum State to apply the law of

another State when the forum State has no substantive relationship to the subject matter of the proceeding: in that case, the forum State has no legitimate legislative authority in the first place. But it is very different to tell a State that it must set aside its law in favor of the law of a sister State—law resting on nothing more than a contrary assessment of the relevant interests—even though its own legislative jurisdiction over the matter is unquestioned. As this Court has recently observed, it is not the business of one State to "impose its own policy choice on neighboring States." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571 (1996).

It is true, of course, that the application of its own law by one State may have an effect on the sovereign responsibilities, even the "core sovereign responsibilities," of another State. But this Court has never held that this fact justifies the displacement of legitimate legislative authority. To the contrary, in *Bonaparte v. Tax Court*, 104 U.S. 592 (1881), the Court expressly rejected an argument that the Full Faith and Credit Clause barred one State from taxing obligations issued by another State, stating: "No State can legislate except with reference to its own jurisdiction. One State cannot exempt property from taxation in another. Each State is independent of all the others in this particular." 104 U.S. at 594. The Court recognized that taxation of State debt obligations might affect the issuing State's ability to "borrow[] money at reduced interest" (*id.* at 595)—surely an "interference" with "core sovereign responsibilities"—but it nevertheless concluded that the Constitution provided no basis for suppressing the taxing power of another State. *See id.* ("States are left free to extend the comity which is sought, or not, as they please"). *See also State of Georgia v. City of Chattanooga*, 264 U.S. 472, 480 (1924) ("[l]and acquired by one state in another state is held subject to the laws of the latter . . . .").

The Full Faith and Credit Clause would be, in fact, an extremely unlikely place to find a significant constitutional

limitation on state legislative authority. Although the Board is correct in saying that the Clause "'altered the status of the States as independent sovereigns,'" FTB Br. 23 (quoting *Estin v. Estin*, 334 U.S. 541, 546 (1948)); *see also Sun Oil*, 486 U.S. at 723 n.1, that general observation—which could be made about a number of constitutional provisions—says nothing about the particular way in which it did so. This Court has made clear, however, that the principal effect of the Full Faith and Credit Clause on the States as "independent sovereigns" was to require them to recognize other state *judgments*, not to reallocate their respective legislative powers. As a consequence, the Court has consistently made a distinction between "the credit owed to laws (legislative measures and common law) and to judgments." *Baker by Thomas*, 522 U.S. at 232. While emphasizing that "[r]egarding judgments . . . the full faith and credit obligation is exacting," 522 U.S. at 233, the Court has found a far less demanding obligation with respect to state laws, holding to the established principle that a State may apply its own law to matters on which it is competent to legislate. *See id.* at 232.[7]

This difference in treatment is well-grounded in the historical record. At the time that the Full Faith and Credit Clause was drafted, the attention of the Framers was primarily on the respect to be given to judgments of sister States. *See Nadelmann, Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 Mich. L. Rev. 33, 53-59 (1957); Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 Memphis State U. L. Rev. 1, 33-39 (1981); *see generally* Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Colum. L.

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[7] The obligation to respect sister-State judgments may, of course, impinge to some extent upon the legislative interests of a forum State. As we discuss, however, that more limited intrusion is supported by the relevant constitutional history combined with the ensuing legislation enacted by Congress pursuant to its powers under the Full Faith and Credit Clause. *See* pages 24-28 *infra*.

Rev. 1 (1945). This was the principal question that the States had confronted during colonial times and during the period governed by the Articles of Confederation (which contained its own full faith and credit provision), with various States having arrived at various solutions. *See* Nadelmann, 56 Mich. L. Rev. at 34-54; Whitten, 12 Memphis State U. L. Rev. at 19-31. The constitutional debate thus took place against a background of indecision about whether other-State judgments were to have only an assigned evidentiary value, or to be given the more authoritative status of domestic judgments. *See* Whitten, 12 Memphis State U. L. Rev. at 31-33.

The treatment of full faith and credit for state laws occupied a distinctly secondary position. The issue appears not to have caused any great controversy during the years preceding the Convention, and discussion of the "public acts" language in the draft Full Faith and Credit Clause was brief and largely unilluminating. *See* Nadelmann, 56 Mich. L. Rev. at 53-59; Whitten, 12 Memphis State U. L. Rev. at 33-39. The most directly relevant piece of the legislative record—a statement by James Wilson of Pennsylvania that "if the Legislature were not allowed to *declare the effect* the provision would amount to nothing more than what now takes place among all independent Nations" (3 M. Farrand, The Records of the Federation Convention of 1787, at 488 (1911))—is, on its face, addressed to the question whether Congress should be given the power to prescribe the "effect" of the "public Acts, Records, and Judicial proceedings" covered by the draft Clause. William Samuel Johnson of Connecticut then observed that the proposed language "would authorize the Genl. Legislature to declare the effect of Legislative acts of one State, in another State." *Id.* The principal opposition to the proposal, raised unsuccessfully by Edmond Randolph of Virginia, addressed the same point about congressional authority, objecting that this "definition of the powers of the [National] Government was so loose as to give opportunities of usurping all the State powers." *Id.*

Wholly absent in the course of this discussion is any indication that the Full Faith and Credit Clause would necessarily "usurp[]" significant State powers by requiring the States to subordinate their otherwise-applicable substantive laws to the contrary laws of another State.[8]

The brevity (and opacity) of this debate is wholly out of keeping with the theory that, in the Full Faith and Credit Clause, the States were permanently ceding to each other part of their traditional, jealously guarded legislative authority. Furthermore, it appears that the Clause generated no subsequent debate among the States during the process of ratification. *See* Sumner, *The Full Faith and Credit Clause—Its History and Purpose*, 34 Oregon L. Rev. 224, 235 (1955). Having contended at great length over their surrender of certain legislative powers to the federal government, it is utterly implausible to think that the States would agree, in almost total silence, to accept a provision that required them to engage in subservience to the laws of their neighbors. This is especially so in light of the fact that the States had just endured a period in which distrust among the several States, and concern about the unfairness of certain state laws, had been widespread and, for the most part, well-warranted. *See generally* Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425, 1447-48 (1987) (discussing the States' fractious relations under the Articles of Confederation); Sumner, 34 Oregon L. Rev. at 241 ("[a]t the time that the

[8]Professor Whitten has argued that the historical evidence provides no basis for concluding that the Full Faith and Credit Clause ever compels States to subordinate their own laws. *See* Whitten, 12 Memphis State U. L. Rev. at 62-69. In his view, "the original meaning of the Full Faith and Credit Clause as applied to conflict-of-laws problems was a very narrow one: the clause directly required the states to admit the statutes of other states into evidence only as conclusive proof of their own existence and contents; it did not require the states to enforce or apply the laws of other states; Congress, however, was given exclusive authority under the second sentence of article IV, section 1 to establish nationwide choice-of-law rules for the states." *Id.* at 62-63.

delegates to the Constitutional Convention met there was no unity among the states. The states considered each other as foreign countries").

The Framers, of course, had some familiarity with conflict-of-laws principles, which had gradually become a part of the law of nations. *See generally*, Juenger, *A Page of History,* 35 Mercer L. Rev. 419 (1984). But, even if those emerging principles were properly looked to for an understanding of domestic full faith and credit doctrine, they would not support the "new rule" proposed by the Board: at the time of the Convention, no one would have seriously thought that the law of nations provided grounds for the forced displacement of legitimate forum-State law by the law of another State. The most noted early American commentator, Joseph Story, stressed, as "[t]he first and most general maxim or proposition" underlying the field of conflict of laws, "that every nation possesses an exclusive sovereignty and jurisdiction within its own territory." Story, *Commentaries on the Conflict of Laws*, § 18, at 25. This maxim, in turn, gave rise to another: "that whatever force and obligation the laws of one country have in another, depend solely upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent." *Id.* § 23, at 30. Based on these maxims, Story reasoned that, while application of the law of another sovereign was often necessary to advance international commerce and relations, "[n]o nation can be justly required to yield up its own fundamental policy and institutions, in favour of those of another nation." *Id.* § 25, at 31. *See also* Nadelmann, 56 Mich. L. Rev. at 75-81.[9]

[9] The influential Dutch jurist, Ulrich Huber, likewise recognized that "a sovereign may refuse to recognize 'rights acquired' abroad if they would prejudice the forum's 'power or rights.'" Juenger, 35 Mercer L. Rev. at 435. Huber, in turn, had a great influence on English choice-of-law principles. *See id.* at 440.

It is thus not surprising that Congress, having been given express authority in the Full Faith and Credit Clause to declare the effect of properly authenticated "public Acts, Records, and judicial Proceedings," promptly enacted a statute that declared the effect of records and judicial proceedings, but *not* of public acts. *See* Act of May 26, 1790, 1 Stat. 122 (1790); Nadelmann, 56 Mich. L. Rev. at 60-61. This reticence, too, hardly fits with the notion that the Framers intended the Full Faith and Credit Clause to be a wide-ranging vehicle for limiting the States' capacity to establish and enforce their own laws within their own borders. Indeed, for more than 150 years, the federal statute continued to make no mention of the effect of "public Acts." *See* Nadelmann, 56 Mich. L. Rev. at 81-82. And, while the 1948 revision of the United States Code finally changed that, *see* Act of June 25, 1948, 62 Stat. 947 (1948); 28 U.S.C. § 1738, the generally accepted view is that this modification was not intended to reflect any substantive change, but was simply the result of a blunder by the revisers. *See* Whitten, 12 Memphis State U. L. Rev. at 61 ("[t]he revisers obviously did not have any idea what they were doing"); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. Chi. L. Rev. 9, 19 (1958) ("a notably footless piece of draftsmanship").

This Court, likewise, has generally been careful not to construe the Full Faith and Credit Clause to limit the legislative jurisdiction of the States. Without recounting that history in detail, it suffices to say that, prior to the early 20th century, the Court had largely regarded the Clause as a provision mandating respect for judgments, not as a command for States to defer to sister-State laws. *See* Jackson, 45 Colum. L. Rev. 7 (noting that "cases as to judgments . . . constitute the bulk of full faith and credit litigation"). Furthermore, even after the Court undertook to order forum States to apply the law of other States (under both the Full Faith and Credit Clause and the Due Process Clause), it did so infrequently, and primarily in cases reflecting

(if not stating) the basic proposition that a State *without* legislative jurisdiction may not apply its substantive law in preference to that of a State with legislative jurisdiction. *See* Currie, 26 U. Chi. L. Rev. at 76-77; *see also id.* at 19-76 (reviewing cases).

To be sure, the Court did not always avoid interference with the legislative authority of a forum State. Perhaps the most striking example was the decision in *Bradford Electric Co. v. Clapper*, 286 U.S. 145 (1932), where the Court held that the Full Faith and Credit Clause required a New Hampshire federal court to apply Vermont law in a tort suit filed by the estate of a Vermont worker killed in New Hampshire. That decision—which effectively barred New Hampshire from providing redress for an accidental death within its borders—seemingly did limit its authority with respect to an occurrence over which it undoubtedly had lawmaking power. But *Clapper* did not stand the test of time. Just seven years later, the Court in *Pacific Employers* "limited its holding to its facts," *Hall*, 440 U.S. at 423 n. 23, while announcing that a State need not "substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." 306 U.S. at 501. That remains the standard recognized by this Court to the present day. *See Baker by Thomas*, 522 U.S. at 232; *Sun Oil*, 486 U.S. at 722; pages 13-16 *supra*.

B. The Proposed Rule Would Require Courts To Make Subjective, Largely Standardless Judgments.

The "new rule" proposed by the Board not only is ungrounded in history and precedent, but would raise a host of largely unanswerable questions. Although the Board seemingly has abandoned its position (FTB Reply to Brief in Opposition 4-6) that the Court should apply a "balancing test" to decide whether Nevada must apply California law, its current stance—by asking the Court to make a constitutional value judgment

about the benefits of state immunity versus the benefits of compensating individuals and deterring wrongful behavior—is really just a call for balancing in a different guise. Furthermore, the rule is open-ended in a way that will require elaborate, and essentially standardless, inquiries into what is to be categorized as "interfer[ence] [with a] sister State's capacity to fulfill its own core sovereign responsibilities."

The essential premise of the "new rule" is evident from its carefully constructed terms: that, under the Full Faith and Credit Clause, laws providing sovereign immunity for core sovereign actions must always trump the laws of States providing compensation for unlawful acts within their borders. But there is simply no basis on which to elevate *legislatively conferred* sovereign immunity into a position of constitutional supremacy. In *Nevada v. Hall*, of course, this Court held that the States have no inherent right to sovereign immunity in the courts of another State, finding that such immunity was neither recognized as a matter of right at common law, nor provided to States (at the expense of other sovereign interests) in the plan of the Convention. *See* 440 U.S. at 414-21, 424-27; *see also Alden*, 527 U.S. at 738-40. In light of that holding—which the Board has not challenged in either its petition or in its brief on the merits—it is totally implausible to think that the Framers, while making no grant of inter-State immunity as a matter of right, nevertheless intended to force States into recognizing legislatively created immunity defenses through the backdoor mechanism of the Full Faith and Credit Clause.[10] Unsurprisingly, the brief debates about the meaning and effect of the

[10]A group of States, appearing as *amici curiae*, does urge the Court to overrule *Nevada v. Hall* insofar as it held that the States do not have inherent immunity in the courts of other States. *See* Brief *Amici Curiae* Florida *et al.* at 1-19. As we discuss, *see* pages 41-45 *infra*, this issue is not within the Question Presented in this case, and, in any event, *amici* have provided no good reason either for disregarding *stare decisis* or for thinking that *Nevada v. Hall* was wrongly decided.

Clause contain no mention of sovereign immunity at all, much less compelled sovereign immunity in the courts of another State.

The Board also provides no authority from which the Court could declare that the interest in protecting States from liability is somehow intrinsically and invariably superior to the competing sovereign interests in compensating persons for their injuries and in deterring intentional torts. As a general matter, of course, the citizens of each individual State may decide for themselves that immunity for governmental misconduct is needed in order to fulfill the State's "core sovereign responsibilities," thereby subordinating claims for injuries suffered at government hands. The citizens of other States, however, are free to take a different view, concluding that immunity not only would leave injured persons without an effective remedy, but would remove an important incentive for government officials to refrain from acts of wrongdoing. The task of sorting out those competing interests is one that legislatures commonly undertake on a state-by-state basis, but there are no judicial tools available for determining, as a matter of constitutional law, which interest, or combination of interests, is more important.

This absence of judicially manageable standards, in fact, serves to explain why the Court no longer employs a balancing test as part of its general full faith and credit analysis. At one time, in cases decided during roughly a thirty-year period, the Court occasionally indicated that it would decide which of several state laws should apply, as a constitutional matter, "by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight." *Alaska Packers Ass'n v. Industrial Accident Comm'n of California*, 294 U.S. 532, 547 (1935); *see also Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 73 (1954); *Hughes v. Fetter*, 341 U.S. 609 (1951). This forced selection of a particular state law, of course, is inconsistent with the now-accepted understanding

that more than one State can constitutionally exercise legislative jurisdiction over a particular matter. *See Phillips Petroleum*, 472 U.S. at 823; *Sun Oil*, 486 U.S. at 727. Even more basically, however, the balancing approach suffered from the fact that there is no such thing as a constitutional "scale of decision" that can measure the "weight" of competing legitimate state interests. *See* Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. Chi. L. Rev. 440, 472-73 (1982); *see also* Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 Cornell L. Rev. 94, 112 (1976) (expressing concern that balancing courts "might simply assign weights, without any determinable standard, to justify the results of cases decided on other premises"). Thus, by the time of the decision in *Allstate Ins. Co. v. Hague*, the practice had fallen into disuse, and all eight participating Justices in that case, speaking in three different opinions, explicitly acknowledged that the Court had "abandoned the weighing-of-interests requirement." *Id.* at 308 n.10 (plurality opinion); *id.* at 322 n.6 (Stevens, J., concurring in judgment); *id.* at 339 n.6 (Powell, J., dissenting). Even in the reconfigured form of a "new rule," there is no reason to breathe life back into that "discredited practice." *See id.* at 339 n.6 (Powell, J., dissenting).

The terms of the proposed rule raise other troublesome questions as well. To begin with, it is not self-evident why the rule requires full faith and credit for "legislatively immunized acts," but not for other state laws that might bear on "core sovereign responsibilities." If the Full Faith and Credit Clause were meant to protect the activities of one State from interference by the laws of another State, it would seem to follow that the rule would extend beyond "legislatively immunized acts," to any acts important to state operations. The Board, in fact, seems to say so itself. *See* FTB Br. 37 (suggesting that its rule would apply to "any number of various programs that are vital to state interests"). That, of course, would raise several problems. First, it would cut an even wider

swath through the legislative jurisdiction of the several States, blocking them from applying their own laws in an ever-expanding number of cases. Second, it would seemingly require the overruling of *Bonaparte v. Tax Court*, where, as we have noted (*see* page 23 *supra*), the Court held that the Full Faith and Credit Clause does not require a State to defer to laws of another State making its debt obligations immune from taxation, even though its refusal to do so would obviously raise the borrowing costs to the issuing State and thereby interfere with the sovereign responsibility of obtaining necessary funds. *See* 104 U.S. at 595. At the very least, therefore, unless the "new rule" has been fashioned simply to fit this case, defendant States may regard it as just a first step towards displacement of any laws that they consider inhospitable to the conduct of their government operations.

It also seems that the proposed rule would permit state legislatures to confer binding immunity, not just on the State itself and its agencies, but on individual state officials and subdivisions, such as counties and cities. The terms of the rule are certainly broad enough to encompass such immunity, and, if the touchstone of the rule is to prevent interference with "core sovereign responsibilities," it rationally could apply to any official or entity designated to carry out important State functions, at least while acting under authority delegated from the State. It is true, of course, that the Eleventh Amendment and related doctrines of sovereign immunity do not typically extend protection to individuals and local governments, *see, e.g., Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 609 n.10 (2001), but the rule proposed by the Board does not—indeed, after *Nevada v. Hall*, could not—find a basis in historic doctrines of sovereign immunity. Rather, it rests on whatever immunity a state legislature chooses to grant with respect to "core sovereign responsibilities," a potentially far-reaching basis for nullifying other States' laws.

These uncertainties are modest, however, compared to the most basic problem with the "new rule": that, even if one can figure out what kinds of laws and entities are covered generally, there is still no standard by which to judge what might constitute "core sovereign responsibilities" or what might be thought sufficient to "interfere[]" with a State's "capacity to fulfill" them. *See* FTB Br. 32 ("there is no clear definition of what constitutes a core sovereign responsibility . . . ."). Every State possesses broad police powers, which are exercised in hundreds of ways, ranging from criminal investigations to state aid programs. Any action in furtherance of those powers could be thought, in one sense or another, to be necessary to the exercise of "core sovereign responsibilities," so that *any* threat of litigation with respect to *any* of them would be regarded as inhibiting state employees from carrying out their jobs. *See* FTB Br. 37 (complaining that "widespread application" of the decision below "could (and perhaps would) interfere with (and likely cripple) the States' ability to conduct any number of various programs that are vital to state interests, *each of which is a core sovereign responsibility*") (emphasis added). Alternatively, a State could argue that any significant award of damages would deprive the State of funds needed to meet its responsibilities, regardless of the particular state action (for example, a traffic accident) that gave rise to the lawsuit in question. If those kinds of arguments are to be accepted, it will mean that a State, just by granting itself immunity, could effectively do whatever it pleased within the borders of other States, without the prospect of being held to account, so long as it was somehow acting within one of its recognized powers. On the other hand, if the rule is to depend on a case-by-case examination of each State activity, and a further inquiry into the extent of possible interference caused by each lawsuit (or class of lawsuits) with respect to that activity, the courts applying the rule would face intractable questions of line-drawing comparable to, if not worse than, those presented by the now-departed weighing-of-interests test.

This case presents an example of just some of these difficulties. Although the Board emphasizes that States have a strong interest in conducting their tax programs, it does not explain, for purposes of understanding its rule, just what programs the States would not have a strong interest in conducting. Moreover, and in any event, this assertion about the importance of tax operations goes to only part of the proposed inquiry: the question, then, is whether the law of Nevada, if applied here, would seriously impede the capacity of California to collect its tax revenues. That seems unlikely if only because the California tax proceeding against respondent remains ongoing in California. Furthermore, the Nevada Supreme Court expressly held that the Board should be allowed immunity under California law for any negligent or good-faith discretionary acts, Pet. App. 11-12, a fact that the Board conspicuously ignores. As a result, Nevada law leaves California free to investigate and prosecute taxpayers in Nevada without any genuine concern that it will face liability for mere misjudgments or for actions amounting to nothing more than an abuse of discretion. The ultimate issue thus comes down, not to whether California can engage in the "normal procedures at its disposal," FTB Br. 33, but to whether California must have the latitude to commit intentional torts, or perhaps to have "breathing space" with respect to the commission of intentional torts, in order to operate its system of tax assessment and collection.

This idea is hard to credit for several reasons. First of all, many States are able to operate their tax systems without across-the-board immunity. While the Board cites to certain States that extend broad protection, FTB Br. 12 n.5, other States provide immunity that stops well short of shielding all misconduct. *See, e.g.*, ARIZ. REV. STAT. § 12.820.01 (2002); OHIO REV. CODE ANN. 2743.02 (Anderson 2002); WASH. REV. CODE § 4.92.090 (2002). Furthermore, many States allow personal suits against state officials for intentional or malicious wrongdoing. *See, e.g.*, ARK. CODE ANN. § 19-10-305(a) (2002); FLA. STAT.

§ 768.28 (2002); MD. CODE ANN., CTS. & JUD. PROC. § 5-522(b) (2002). The existence of that liability, which obviously acts as a deterrent to tortious acts by State employees, strongly suggests that the States do not regard such behavior as essential to their operations. *See Biscoe v. Arlington County*, 738 F.2d 1352, 1360-61 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985) (recognition of personal liability for individual officials casts doubt on justification for governmental immunity).

An equally compelling reason to doubt the need for total immunity is that California itself allows actions against the State for misconduct by its tax officials. Thus, the curiously worded immunity statute relied on by the Board, California Government Code § 860.2 (Pet. Br. App. 1-2), applies only to "instituting" proceedings and actions and to acts with respect to the "interpretation or application of any law relating to a tax." *Id.* The California Supreme Court has not construed this language, but even broadly construed, it would hardly seem to cover all operational torts committed by state tax officers. More importantly, other sections of the Code expressly allow a taxpayer to "bring an action for damages," *see* California Government Code § 21021 (FTB Br. App. 11), whenever Board employees have recklessly disregarded published procedures. *Id.* As the Board recognizes, FTB. Br. 11 n.4, this statute would be meaningless if the California immunity statute barred all tax-related claims.[11] Taken as a whole, therefore, the tolerance of various damage actions under the laws of many States, combined with the availability of state-law actions even under

[11] This provision also demonstrates that, contrary to the theory of *Amici Curiae* National Governors Association, *et al.*, an action for damages is not a "collateral[]attack" on administrative tax proceedings. *Id.* at 11. As previously noted, the tax case against respondent is continuing unabated in California. *See* page 2 *supra*; FTB Br. 4.

California law, severely undercuts the Board's position that total immunity is necessary to operation of an effective tax system.[12]

Finally, we note that the "new rule" urged by the Board is utterly boundless: the rule would compel Nevada to recognize immunity for any acts related to core sovereign responsibilities—no matter how despicable or abusive—as long as California was willing to immunize them. Under the terms of the rule, California officials would be able to assert immunity for assaulting Nevada citizens as part of a police investigation, or subjecting those under investigation to libel in Nevada newspapers. Indeed, while the behavior in this case is bad enough, the rule would permit Board auditors, instead of just going through respondent's mail and garbage, to enter his house and rummage through his drawers and files, all without concern that Nevada could order the State to provide compensation for those acts. Or investigators could expressly threaten respondent with further disclosure of his personal and professional information if he persisted in his unwillingness to settle the inflated tax claims, again without fear of exposing the Board to liability. Perhaps the Board thinks this is all well and good, but it is a truly remarkable proposition that, in the face of such actions, the Constitution would render Nevada powerless to apply its own laws and provide relief.

C. The Proposed Rule Is Unnecessary.

The rule proposed by the Board rests, at bottom, on a simple policy argument: that, unless this Court reads its proposed rule into the Full Faith and Credit Clause, state courts will seriously

[12] If the Board is ultimately advancing only a right to require observance of California law with respect to the *forum*, its full faith and credit argument grows weaker still. This Court has held that the Clause does not bar a State from disregarding a forum selection provision, even when the court is applying the substantive law of another State. *See Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965).

interfere with the fundamental operations of sister States. The Board disregards, however, the many sources of protection already available to shield States from genuine disruption.

In the first place, principles of comity, as they have for centuries, continue to provide strong assurance that private suits will not unduly interfere with government operations. Because States have never had immunity as of right in the courts of other States, *see Hall*, 440 U.S. at 414-21, it is the doctrine of comity—both before and after formation of the Republic—that has given them protection in state courts other than their own. *Id.* As has long been the case among sovereign nations, *see Hilton v. Guyot*, 159 U.S. at 163-66, sovereign States have traditionally applied the doctrine of comity with a healthy regard for the sovereignty of their sister States. *See Hall*, 440 U.S. at 417-18. This tendency is naturally reinforced by a well-developed self-interest, grounded in the awareness that other States, as equal sovereigns, have the power to grant or withhold comity in their own right.

This regard for the sovereignty of sister States has continued even after the decision in *Nevada v. Hall*. Although many States then expressed concern about uncertainties arising from that decision, *see* Brief of West Virginia *et al. Amici Curiae* in Support of Petition for Rehearing, No. 77-1337 (Oct. Term 1977), at 2-10, recent history shows that state courts have continued to dismiss suits against their sister States. *See, e.g., Reed v. University of North Dakota*, 543 N.W.2d 106 (Minn. Ct. App. 1996); *University of Iowa Press v. Urrea*, 440 S.E.2d 203 (Ga. Ct. App. 1993). Moreover, in cases where state courts have agreed to hear claims against another State, the forum court has often done what the Nevada Supreme Court did below: looked to the immunity of the forum State in determining what acts of the defendant State would be subject to suit. *See, e.g., McDonnell v. Illinois*, 748 A.2d 1105, 1107 (N.J. 2000); *Struebin v. Iowa*, 322 N.W.2d 84, 86 (Iowa), *cert. denied*, 459 U.S. 1087 (1982); *Morrison v. Budget Rent A Car*

Systems, 230 A.D.2d 253, 268 (N.Y. App. Div. 1997); *see also Head v. Platte County*, 749 P.2d 6, 10 (1988) (suit against municipality with state-law immunity). This practice, of course, makes it highly improbable that a defendant State would be exposed to liability that genuinely imperils legitimate government activity. While the States grant themselves different degrees of immunity for government actions, few States are likely to subject themselves to state-law suits that will prevent them from carrying out critical governmental functions.

This history of consideration for defendant States also addresses the concern, expressed by the dissenting Justices in *Hall*, that a forum State would treat a defendant State "just as it would treat any other litigant." *Nevada v. Hall*, 440 U.S. at 428 (Blackmun, J., dissenting). Under traditional principles of comity, and certainly under a practice of looking to forum-State immunity, it will simply not be the case that "State A can be sued in State B on the same terms as any other litigant can be sued." *Id.* at 429 (Blackmun, J., dissenting). As the cases cited by the Board themselves demonstrate, and the decision below confirms, state courts are fully capable of recognizing the sovereign interests of other States, using their own sovereign interests as a benchmark. *See Guarini v. New York*, 521 A.2d 1362 (N.J. Super. 1986), *aff'd*, 521 A.2d 1294, *cert. denied*, 484 U.S. 817 (1987); *Xiomara Mejia-Cabral v. Eagleton School*, Mass. Super. LEXIS 353, 10 Mass. L. Rep. 452 (Mass. Sup. Ct. 1999). By regarding state defendants as sovereigns of equal stature, not as private litigants, States are thereby according them the respect to which they are entitled in "our constitutional system of cooperative federalism." *Hall*, 440 U.S. at 424 n.24.

The States also have more formal methods of assuring protection for themselves. If two States have concerns about possible liability in each other's courts, they may arrange between themselves to provide immunity on a reciprocal basis. (This kind of agreement would not alter the federal-state balance and should not require approval by Congress. *See Cuyler v.*

Adams, 449 U.S. 433, 440-41 (1981)). Or, if a number of States share the same overall viewpoint about the need for immunity, they may enter into a larger multi-State agreement, similar to the agreement that established the Multistate Tax Commission. *See generally United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978). These agreements would have the advantage of allowing the signatory States to decide for themselves what legislative authority they are willing to surrender within their borders in return for recognition of more expansive sovereign immunity in the courts of other States. At the same time, the agreements would not force unwilling States to give up their legislative authority, as the constitutional rule advocated by the Board necessarily would do.

In addition to these avenues, the Full Faith and Credit Clause itself provides another: the possibility of legislative action by Congress, declaring the "effect" of state immunity laws in other States. *See Sun Oil*, 486 U.S. at 729 ("it can be proposed that Congress legislate to that effect under the second sentence of the Full Faith and Credit Clause"). The Clause, of course, contains an express grant of power to Congress to declare the "effect" of public acts in state courts. As the national legislative body, Congress is well-positioned to consider the competing interests of all States, including (but not limited to) the interest of defendant States in avoiding burdens on their government operations. *See generally Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1988). Moreover, unlike a constitutional holding that would freeze the rights of forum and defendant States, any congressional legislation addressing inter-State immunity could thereafter be amended, if and when circumstances so dictated.

These alternative methods offer significant safeguards for State defendants, all without permitting one State to unilaterally preempt the legislative jurisdiction of another State merely by passing a law to immunize itself. This Court has previously declined the invitation to "embark upon the enterprise of

constitutionalizing choice-of-law rules, with no compass to guide us beyond our own perceptions of what seems desirable." *Sun Oil Co.*, 486 U.S. at 727-28. It should decline that invitation here as well.

III. THIS COURT SHOULD REJECT THE INVITATION OF *AMICI CURIAE* TO OVERRULE *NEVADA V. HALL*.

The Florida *et al. amici curiae* brief raises an issue that the Board does not raise: that the States have inherent sovereign immunity in the courts of other States and that this Court should overrule that part of *Nevada v. Hall* holding to the contrary. This question is not set out in the Question Presented in the petition, nor is it fairly included therein. *See* Sup. Ct. Rule 14.1(a). Rule 14.1(a) of the Rules of this Court plainly states that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court," and this Court has said that it will depart from the rule "'only in the most exceptional cases.'" *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 (1993) (quoting *Yee v. Escondido*, 503 U.S. 519, 535 (1992)). *See also Taylor v. Freeland & Krontz*, 503 U.S. 638, 646 (1992) (Rule 14.1(a) "helps to maintain the integrity of the process of certiorari"). Here, the Board could not have been more clear, in setting forth the Question Presented, that the only question it was raising was whether the Full Faith and Credit Clause required the Nevada courts to apply Section 860.2 of California Government Code. *See* Pet. i. This is a very different question, answered by reference to wholly different historical materials and case law, than the question *amici* now seek to raise. *Amici* may believe that the Board presented the wrong question, but they are not free to redraw the case to their liking.[13]

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[13] The issue that *amici* now want to raise was not, in fact, included in the Question Presented in the States' own *amici curiae* brief filed at the certiorari stage. *See* Brief *amici curiae* of Oregon *et al.* at i.

We nonetheless will briefly address their arguments, which fall far short of making a case for reconsidering, let alone overruling, *Nevada v. Hall*. "Time and time again, this Court has recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (quoting *Welch v. Texas Dep't of Highways*, 483 U.S. 468, 494 (1987)). Because "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority," 502 U.S. at 202, the Court has emphasized that it "will not depart from the doctrine of *stare decisis* without some compelling justification." *Id.* There is no "compelling justification" here.

The principal argument made by *amici* is based on historical evidence that, at the time of the Convention, independent sovereigns traditionally accorded immunity to other sovereigns in their courts. *See* Brief *Amici Curiae* Florida, *et al.* 5-12. But this argument offers nothing new: this Court explicitly recognized this practice of granting immunity in *Nevada v. Hall*, discussing the same principal authority (*The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812)) that *amici* now address. *See* 440 U.S. at 417. What the Court in *Hall* also pointed out, however, and what *amici* only briefly try to refute, is the unimpeachable evidence that sovereigns extended this immunity, not as a matter of absolute right, but as a matter of comity. *See* 440 U.S. at 416-17. Chief Justice Marshall made this plain in *The Schooner Exchange* itself (11 U.S. (7 Cranch) at 136), and this Court has held to that view ever since. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) ("[a]s *The Schooner Exchange* made clear, . . . foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution"). Moreover, as further proof that immunity among co-equal sovereigns is extended as a matter of comity not right, it is unquestioned that the United States (the sovereign

extending immunity in *The Schooner Exchange*) has since significantly, and unilaterally, *reduced* the amount of immunity that it grants to foreign sovereigns, exercising its own sovereign right to decide the legal consequences of acts within the scope of its legislative competence. *See* 28 U.S.C. §§ 1602 *et seq.*; *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976); *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). All this history and experience is simply incompatible with an attempt to revive the already-rejected theory that immunity in the courts of other sovereigns could be demanded as a matter of absolute privilege.

Amici also rely heavily on the *Alden* decision, which held that States have sovereign immunity in their own courts even with respect to certain federal claims. *See* 527 U.S. at 711-61. But *amici* simply disregard the parts of the decision that undermine their position. Thus, *amici* do not deal with, or even acknowledge, the fact that the Court in *Alden* expressly distinguished the absolute right of a sovereign to immunity in its own courts from its lack of sovereign immunity in the courts of another sovereign. 527 U.S. at 738-40. Quoting (rather than rejecting) *Nevada v. Hall*, the Court recognized that a claim of immunity in another State "'necessarily implicates the power and authority of a second sovereign.'" *Id.* at 738 (quoting *Hall*, 440 U.S. at 416). For that reason, the Court said, "its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.'" *Id.* The Court then reiterated what it had previously determined: that "the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another . . . ." 527 U.S. at 738.[14]

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[14] This statement in *Alden* addresses the proper question: whether the Constitution *granted* States a right to absolute immunity in other States'

The Court in *Alden*, in fact, placed great emphasis on just the point that we make here: that, after formation of the Union, the individual States retained much of their preexisting sovereignty. 527 U.S. at 713-15. Whatever else that sovereignty encompasses, it naturally includes, first and foremost, the residual lawmaking authority necessary for the sovereign to govern within its sovereign limits. As the Court noted in *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136, "[a]ny restriction upon [the jurisdiction of a nation within its own territory], deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction . . . ." Reflecting this understanding, and the terms of the Tenth Amendment, the Court has quite correctly expressed its "reluctance to find an implied constitutional limit on the power of the States . . . ." *Alden*, 527 U.S. at 739.

To be sure, the decision in *Alden* detailed considerable evidence that the States, at the time of the Convention, had great concerns about their vulnerability to suit in the newly created federal courts. But that concern cannot be extrapolated wholesale into an equivalent concern about suits in the courts of other States. The States' worries about suit in the courts of the National Government were based, not just on the fact that it was to be a new sovereign with its own system of courts, but on the fact that, under the constitutional plan, it was to be a *superior* one. As a consequence, the principles of mutual comity that had traditionally assured reciprocal immunity among co-equal sovereigns—like the States themselves—would be out of balance: at common law, a superior sovereign had immunity *as of right* in the courts of a lesser one. *See Hall*, 440 U.S. at 414-15. That problem, arising out of the particular problem caused

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courts. In so doing, it effectively disposes of the back portion of *amici's* argument, which is based on the erroneous notion that sovereign immunity as of right did exist before formation of the Union, and thus asks whether it was *abrogated* in the Constitutional plan. *See* Brief *amici Curiae* Florida *et al.* at 12-18.

by creation of a federal sovereign imbued with supremacy over State sovereigns, had nothing to do with the terms of the States' continuing sovereign relations with one another.

In short, *amici* are treading old ground. The States did not have immunity as of right in each other's courts, and nothing in the Constitution, or the plan of the Convention, mandated it by diminishing the States' legislative sovereignty within their own borders. *See Alden*, 527 U.S. at 738. Even if the question were properly before the Court, therefore, there is no reason to revisit *Nevada v. Hall*.

CONCLUSION

The judgment of the Supreme Court of Nevada should be affirmed.

Respectfully submitted,

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(13)

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In The Supreme Court of the United States

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT AND EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State Of Nevada

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ARGUMENT

Respondent Hyatt seeks to minimize the extraordinary challenge to cooperative federalism that is presented by this dispute. It bears remembering that this case is about a former California resident who moves to Nevada and then uses the *Nevada* courts to pass judgment on *California's* decision to tax him for his *California* income.[1]

In this Court, petitioner Franchise Tax Board has urged that existing conflicts-of-law methodology is inadequate to address the question of the extent to which the Full Faith and Credit Clause requires Nevada courts to apply California's Government Code section 860.2. The Board argues that existing methodology defers to the *interests* of the forum State over the non-forum State, without regard for the *effects* of the choice of law on the

[1] The BRIEF FOR RESPONDENT GILBERT P. HYATT [Resp. Br.] contains too many factual errors to list; however, some of the more egregious bear mention. For example, Hyatt has alleged that the audit and decisions to issue the NPAs were motivated by the religious prejudice of the third auditor; however, the decision to audit Hyatt was made in 1993, by the first auditor. Record at Vol. 3, # 11, Cox Aff. ¶ 3. Moreover, no auditor made the decision to issue the NPAs; other Board personnel made those decisions after reviewing the final audit report. Record at Vol. 3, # 11, Bauche Aff. ¶¶ 4 and 6. It is also worth noting that in the first proceedings before the Nevada Supreme Court Hyatt accused the Board of "snoop[ing] at mail on the doorstep and record[ing] the timing, description, and quantity of his trash." Record at Vol. 6, # 28, p. 10, lines 10-12. After the Nevada Supreme Court originally granted the Board's writ and found that the Board's "investigative acts were in line with a standard investigation to determine residency status for taxation pursuant to its statutory authority" (Cert. App. 42-43), Hyatt increased the level of accusations, claiming instead that the Board's auditor "looked through his mail and his trash." Resp. Br. at 4. These two examples alone illustrate that Hyatt appears willing to claim (or allege) anything in order to breathe life into his lawsuit.

non-forum State. Such an approach is constitutionally adequate in dealing with suits over traffic accidents caused by agents of the non-forum State while driving in the forum State. *Nevada v. Hall*, 440 U.S. 410 (1979). It is wholly inadequate to deal with suits about official conduct by agents of the non-forum State carried out in the non-forum State and in the forum State in implementation of a core governmental function such as collection of tax debts owed by the plaintiff to the non-forum State.

The Board accordingly urges adoption of a different choice-of-law rule, to apply when suit is brought against the non-forum State or its agents based on activities in implementation of a core governmental function of the non-forum State. Such a rule – based as it is on the potential for interference by the forum State with the non-forum State's capacity to fulfill its own sovereign responsibilities (*see Nevada v. Hall*, 440 U.S. at 424 n.24) – would refer, not to the forum State's *interest* in the choice of law, but rather to the *effects* of the choice on the non-forum State's ability to function as a co-equal sovereign government. It would, in short, require the forum State to give full faith and credit to the non-forum State's own statutes limiting liability for injuries caused by the core sovereign activities that are the subject of the litigation.

A. When the effect of the forum State's policy preference is interference with the defendant State's capacity to function as a co-equal sovereign, a superficial consideration of the forum State's legislative competence will not suffice to dispose of the choice-of-law issue.

Hyatt's argument proceeds from a faulty premise. Hyatt first observes that, in resolving a choice-of-law

question, the Full Faith and Credit Clause allows a State to apply its own law to a subject matter about which it is competent to legislate – a proposition with which the Board generally has no dispute. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 721 (1988), citing *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939). Hyatt next asserts that "[t]he central full faith and credit question, then, is whether Nevada was 'competent to legislate' regarding torts that are the subject matter of this lawsuit." Resp. Br. at 16.

But this Court has never suggested that the inquiry over a forum State's prerogative to ignore a defendant-State's statutory liability limits is merely a matter of confirming the forum State's legislative competency over the conduct giving rise to the alleged liability. It is clear, for example, that in *Nevada v. Hall*, this Court accepted California's rejection of Nevada's liability limitations, not only because California's choice of law rested on a legitimate policy preference about matters over which California has undisputed legislative competency, 440 U.S. at 424, but more importantly, because California's choice did not threaten to interfere with Nevada's capacity to fulfill its own sovereign responsibilities. *See* 440 U.S. at 424 n.24. Hyatt's assertion that Nevada enjoys legislative competency to enact and enforce its tort law does not end the inquiry; at best, it would be merely a beginning.

In any event, it is facetious for Hyatt to argue that nothing is at issue here other than Nevada's legislative competence to define the respective rights and liabilities of persons in their interpersonal interactions. The "person" before the Nevada court as a defendant is, after all, a co-equal sovereign State, and the "interaction" at issue is nothing less than the sister-State's effort to investigate a

possibly fraudulent evasion of tax obligations by the plaintiff based on his prior residency in the defendant State. To be sure, Hyatt's allegations may sound in tort, but those vague allegations *patently* concern the conduct of the critical governmental function of investigating, assessing, and collecting taxes from a delinquent taxpayer – hardly the subject of tort jurisprudence.

What is really at issue here is not mere adjudication of alleged torts, but rather Hyatt's effort to have the Nevada courts supervise and pass judgment upon the manner in which California's taxing agency investigates whether Hyatt has evaded his tax obligation to California.

B. Contrary to Hyatt's assertion, the Board does not seek a cession of *Nevada's* legislative jurisdiction over torts. Rather, the Board seeks an end to Nevada's usurpation of *California's* legislative jurisdiction to limit the kinds of remedies that California taxpayers have to challenge a tax investigation and audit.

Hyatt argues at great length that the Board's proposed rule is inconsistent with full faith and credit history and principles, that it "would strip away significant legislative authority from the forum States," Resp. Br. at 21, and that it suggests that, in the Full Faith and Credit Clause, "the States were permanently ceding to each other part of their traditional, jealously guarded legislative authority." Resp. Br. at 26. The argument rests entirely on Hyatt's own baseless contention that the "legislative authority" truly in question is Nevada's authority to legislate *tort laws*.

The Board does not take issue with Hyatt's lengthy argument to the effect that the Full Faith and Credit Clause was never intended to work a cession of legislative jurisdiction by the States *inter se*. But the argument misses the point. This case is not about compelling a *cession* of the forum-State's legislative sovereignty; it is rather about *usurpation* of the defendant-State's legislative sovereignty.

In order effectively to carry out investigation, assessment, and collection of delinquent taxes, California has deliberately immunized its tax officials from liability for alleged injury caused by acts incidental to the assessment or collection of taxes. Specifically, California Government Code § 860.2 provides that "Neither a public entity nor a public employee is liable for an injury caused by: (a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax [or] (b) An act or omission in the interpretation or application of any law relating to a tax."[2]

This is not to say that California taxpayers have no means to challenge what they believe to be an unwarranted investigation or assessment. Indeed, a California taxpayer, including Hyatt, has all of the following remedies for challenging an audit investigation: (1) a complete review of the tax assessment at the protest stage,[3] (2) an

[2] The statute has been broadly construed by California courts. *Mitchell v. Franchise Tax Board*, 183 Cal.App.3d 1133, 1136, 228 Cal.Rptr. 750 (1986) (statute bars suit for alleged interference with business and credit, slander to title, denial of due process, and punitive damages based on allegedly willful, wanton and malicious behavior).

[3] Cal. Rev. & Tax Code §§ 19041, 19044.

independent administrative review by the five-member State Board of Equalization,[4] (3) a taxpayer's cause of action for a tax agency's failure to follow published procedures,[5] and (4) a de novo judicial review of administrative tax determinations of California residency without the necessity of prepaying the tax.[6]

What an individual taxpayer may not do, however, is sue the Board on the ground that the investigation is injurious – at least such a suit may not be brought in California courts. What Hyatt wants is the right to move to Nevada and sue the Board *there*. The net effect of Nevada's willingness to entertain Hyatt's suit against the Board is nothing short of an usurpation by the Nevada courts of *California's* legislative jurisdiction to limit the kinds of remedies that California taxpayers have to challenge a tax investigation and audit.

C. Hyatt's proffered "contacts" purporting to support Nevada's choice of law are manifestly insufficient as a basis for a choice-of-law decision that results in litigation that interferes with California's capacity to carry out an essential governmental function.

Hyatt acknowledges that Nevada's choice of its own immunity policy over California's statutory liability limits must be based on "a significant contact or significant aggregation of contacts, creating state interests, such that

[4] Cal. Rev. & Tax Code §§ 19045-47.

[5] Cal. Rev. & Tax Code § 21021.

[6] Cal. Rev. & Tax Code § 19381; Cal. Civ. Proc. Code § 1060.5.

choice of law is neither arbitrary nor fundamentally unfair." Resp. Br. at 17. Hyatt asserts that such contacts are present here, but the contacts in this case manifestly cannot justify Nevada's intrusion into California's administration of California taxes.

1. Hyatt's residency in Nevada cannot reasonably justify that State's interference with California's tax collection efforts, because it is precisely Hyatt's move to Nevada that prompted the tax audit in the first instance.

First, Hyatt erroneously asserts as a sufficient "contact" that "Nevada is the State in which the plaintiff suffered his injuries." *Id.* But, as a threshold matter, a plaintiff's residence and place of filing the action are generally accorded little or no significance in the constitutional analysis because of the danger of forum shopping. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820 (1985). Fairness and reasonable expectation of the parties are more important to the analysis. *Id.* at 822. In this case, both fairness and reasonable expectation favor California. Fairness, because only 3% of the activities occurred in Nevada. JA at 237. Reasonable expectation, because: (1) Hyatt was a long-time resident of California, where he worked for many years developing the computer technology that resulted in his receipt of $40 million in income in late 1991 (JA at 48); (2) Hyatt claimed he terminated his California residency just before receipt of that $40 million; and (3) given the suspicious circumstances, Hyatt had every reason to expect that his non-residency claim would be investigated by California agents enforcing California law.

Furthermore, the facts of this case dramatically confirm this Court's concern that reliance on residency as a justification for choice-of-law invites forum shopping. Indeed, it is Hyatt's evident position that this Court's full faith and credit jurisprudence guarantees Nevada's prerogative to serve as a sanctuary for "tax refugees" from California who, solely by virtue of moving (or claiming to have moved) their residence across the state line, may not only avoid the payment of future California income taxes, but may also acquire the standing to sue their former State in Nevada to impede the collection of past taxes due and owing.

2. Even if it existed, Nevada's official hostility to California tax practices would not justify an assertion of the prerogative to supervise the California taxing agency in those practices.

Hyatt asserts as a substantial "contact" the fact that the Board "deliberately took actions that either occurred in Nevada or were specifically intended to have their harmful effects there." Resp. Br. at 19. Hyatt also avers that Nevada may be concerned about "targeting" of Nevada residents by California tax officials. *See* Resp. Br. at 18. In effect, Hyatt suggests that Nevada's hostility to California tax practices would justify Nevada's assertion of judicial supervision over the California taxing agency.

Of course, the State of Nevada is not before the Court. Nor has Nevada itself chosen to appear as amicus curiae to support Hyatt's use of its courts.

In any event, the law is quite contrary to Hyatt's view. Nearly a half-century ago, the Court recognized that full faith and credit would be properly invoked to restrain "any

policy of hostility to the public Acts [of another state]." *Carroll v. Lanza,* 349 U.S. 408, 413 (1955). And, as Justice Stevens noted in his concurring opinion in *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 323 n.10 (1981), in *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980), the plurality opinion described the purpose of the Full Faith and Credit Clause as the prevention of "parochial entrenchment on the interests of other States."

Of course the Board deliberately took actions in Nevada, and of course the Board took actions in California with the intent of effecting a result in Nevada. Hyatt, himself, brought about the tax audit by moving *to Nevada*. If Hyatt fails to cooperate with California tax officials in *California*, then those officials obviously have little alternative but to follow his trail into *Nevada* or forego collection of taxes due and owing. Hyatt's preferences to the contrary notwithstanding, there is no evidence of any official objection by the State of Nevada to California's tax investigations in Nevada, much less of the Board's investigation of Hyatt in particular. And even if there were, such an objection would not be a constitutionally sufficient basis for Nevada's refusal to give full faith and credit to California's statutory structure for its tax collection processes. There are other, more appropriate means for addressing such political issues, e.g., interstate compact negotiations.

D. Hyatt is less than candid in suggesting that California's tax-collection efforts are unaffected by the proceedings in the Nevada courts.

Hyatt makes the misleading assertion that "despite the Nevada litigation, the tax proceeding against respondent is continuing without interruption in California."

Resp. Br. at 10. While the Board will concede that it is attempting to press forward with its investigation despite Hyatt's effort to hamper and derail that investigation, that is hardly the whole of the picture.

The Nevada litigation interferes with the California tax process, first and foremost, by chilling the activities of the Board's auditors and investigators. Because the Nevada courts have resolved to inquire into the whole of California's tax assessment and auditing process (JA at 137-138), every action taken by every Board employee in furtherance of the investigation against Hyatt threatens to become the subject of additional discovery and additional alleged injury.

The interference is analogous to that described in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), wherein this Court held that taxpayers could not sue for damages under 42 U.S.C. § 1983, based upon a property tax assessment. The Court's explanation that a suit for damages "would 'in every practical sense operate to suspend collection of state taxes,'" *ibid.*, fully recognizes that a suit for money damages amounts to a collateral attack on the taxing process. The Court observed:

> Thus, a judicial determination of official liability for the acts complained of, even though necessarily based upon a finding of bad faith, would have an undeniable chilling effect upon the actions of all County officers governed by the same practicalities or required to implement the same policies. There is little doubt that such officials, faced with the prospect of personal liability to numerous taxpayers, not to mention the assessment of attorney's fees under 42 U.S.C. § 1988, would promptly cease the conduct found to have

> infringed petitioners' constitutional rights, whether or not those officials were acting in good faith. In short, petitioners' action would "in every practical sense operate to suspend collection of the state taxes . . . ," *Great Lakes*, 319 U. S., at 299, a form of federal-court interference previously rejected by this Court on principles of federalism.

454 U.S. at 115. No lesser chilling effect results from Hyatt's sweeping action for damages in the Nevada courts.

Furthermore, the Nevada courts' refusal to dismiss Hyatt's tort action has placed the Board in the untenable position of having to comply with outrageous discovery demands or risk sanction of its attorneys and default judgment against the State. And indeed, discovery has been oppressive. Hyatt's trial attorneys have taken 315 hours of deposition testimony from 24 witnesses, have made 329 separate document demands from the Board (which have produced over 17,000 pages of documents), and have made 340 additional document demands to deposed witnesses. Record at Vol. 3, # 11, Ex. 8, pp. 420-422. It is disingenuous for Hyatt to suggest that the Board's tax proceedings in California have not been adversely affected by having to make employees available for depositions and by having to spend hundreds of hours of employee-time marshaling documents for response to document-production demands in the Nevada courts.

Finally, as a direct result of Hyatt's Nevada litigation, the administrative tax process in California has been effectively placed on hold, despite the Board's efforts to

advance it.[7] Specifically, complying with the protective order of the Nevada court, the Board subpoenaed documents and deposition testimony relevant to Hyatt's claims. App. 8. Then, again complying with the protective order of the Nevada court, the Board attempted to enforce the subpoena duces tecum in Sacramento Superior Court, an attempt which Hyatt has opposed by filing his Opposition to Subpoena. App. 1-27. Remarkably, Hyatt has opposed the Board's subpoena on the grounds that California courts must extend full faith and credit to the Nevada protective order, and must accordingly block the Board's access to the relevant tax information.[8] Hyatt's actions in opposing the Board's subpoenas have impeded the progress of the administrative proceedings and are directly contrary to the statements that he makes in his brief filed in this Court, where he claims that "despite the Nevada litigation, the tax proceeding against respondent is continuing without interruption in California." Resp. Br. at 10. The matter is still under submission before the California courts at this time.

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[7] In order to illustrate that Hyatt – despite his contrary representations to this Court – is using the Nevada lawsuit to interfere with the administrative tax proceedings pending in California, the Board has attached the following document as an appendix to this brief:

App. 1-27: Respondent Gilbert P. Hyatt's Response and Opposition to the OSC re FTB's Petition for Order to Compel Compliance with Administrative Subpoena (hereafter referred to as "Opposition to Subpoena").

[8] Hyatt argued that the court in California must accord the protective order full faith and credit, claiming that: "under the Full Faith and Credit Clause, the Nevada protective order is entitled to all the respect and solemnity of any other judicial ruling from a sister state or another California court[.]" App. 26-27.

E. The rule urged by the Board is reasonable, workable, and limited in scope.

This Court's expression of concern in *Nevada v. Hall* has directly led to the following rule as urged by the Board:

> A forum State may not refuse to extend full faith and credit to the legislatively immunized acts of a sister State when such a refusal interferes with the sister State's capacity to fulfill its own core sovereign responsibilities.

Cf., *Nevada v. Hall*, 440 U.S. at 424 n.24.

1. If the rule can be said to involve a "balancing of interests," it is a balancing, not of the parochial interests of one State against those of another, but rather a balancing of the parochial interests of one State against a national, constitutional interest in cooperative federalism.

Hyatt complains that the Board's rule is merely a return to a discredited "balancing of interests" methodology for resolving choice-of-law issues. It is not. Whereas the former balancing-of-interests analysis balanced the interests of the forum State against the interest of the non-forum State,[9] the Board's rule reflects a balancing of the interests

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[9] *See Alaska Packers Ass'n v. Industrial Accident Commission of California*, 294 U.S. 532, 547 (1935).

of the forum-State against the interest of the Union, reflected in a system of cooperative federalism.[10]

Thus, the Board has repeatedly pointed out that its test looks to the *effect* of the choice-of-law decision on the capacity of the defendant State to carry out core sovereign responsibilities. Where, as was the case in *Nevada v. Hall*, the forum State's policy preference can reasonably be said to work no interference with the defendant State's basic capacity to function as a co-equal sovereign, that preference does not offend the mandate of the Full Faith and Credit Clause. But where, as in the instant case, the forum State's policy preference impedes critical tax collection efforts of a co-equal sovereign State, then the Board's rule would require that the parochial interests of the forum State yield to the constitutionally contemplated system of co-equal sovereign States.

The application of this rule prevents a forum State from assuming through its judicial system what amounts to a supervisory role over a sister State's core governmental functions. The rule requires nothing more than that State courts extend full faith and credit to the scope of scrutiny permitted by the acting State in the conduct of its

[10] However, that balancing occurred in the formulation of the rule, not in the application. No consideration is given the interests of the forum State in the application of the rule because, once the rule's elements have been met, the forum State must give "faith" to its sister State's conduct in carrying out its own core governmental functions; cooperative federalism requires no less. In the last analysis, there are certain state functions whose operation falls entirely within the acting State's responsibility. Legislative acts structuring those core sovereign responsibilities are entitled to truly *full* faith and credit under the Full Faith and Credit Clause.

core governmental functions. If the acting State has constitutionally valid immunity statutes that prevent its own courts from interfering in the governmental process, then the forum State must respect that limitation.

2. The Board's new rule has standards sufficiently well-described to enable courts to apply it.

Hyatt claims that the Board's rule is essentially standardless. While the Board acknowledges that there is no bright-line test for a "core governmental responsibility," it is not standardless because States would be able to identify such a responsibility by reference to their own essential operations. All States, for example, collect revenue by one device or another. The assessment and collection of state personal income taxes are the lifeblood of the California government because it is the means by which government is able to function.

That taxes are clearly a core function is supported by ample authority. For example, the ability of the State to assess and collect taxes is so important that the California Constitution bars "any court" from issuing a "legal or equitable process . . . to prevent or enjoin the collection of any tax." Cal. Const., art. XIII, § 32. Federal law similarly mandates that federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. In fact, as pointed out earlier, this Court has held that "taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal court." *Fair Assessment*, *supra*, 454 U.S. at 116. And, in a similar vein, this Court

has recognized "the vital interest of the government in acquiring its lifeblood, revenue" (*Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 21 (2000)) in holding that – despite bankruptcy statutes to the contrary – a debtor bears the burden of proof on a tax claim in bankruptcy court when the substantive law creating the tax obligation puts the burden on the taxpayer.

Although these authorities do not define a "core" sovereign process, they clearly illustrate that tax systems and processes are core. Here, the determination of residency is a foundational step in the collection of state personal income taxes. No State can effectively carry out its tax administration without being able freely to review and investigate a taxpayer's claims, even when they involve a claimed change of residency.

Likewise, all States exercise their law enforcement powers for the preservation of the health, safety, and welfare of their citizens. It is reasonable to characterize tax assessment and collection and law enforcement as core governmental functions, while the same may not be true for recruiting for a state university football team. The difficulty of drawing a bright line is less important than assuring that all processes that clearly are core are protected under the Full Faith and Credit Clause.

In addition, hypothetical difficulties in applying the rule are insignificant when compared to the harm to cooperative federalism – protected by the Full Faith and Credit Clause – that will occur if the Board's rule (or one having the same effect) is not adopted. As explained above, Hyatt's lawsuit is not limited to acts in Nevada, but intrudes into all aspects of California's decisions and actions in auditing Hyatt and assessing taxes against him.

Finally, despite the absence of a bright-line test, this Court has made similar types of determinations in various other settings. For example, in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1977), a five-member majority of this Court held that the Coeur d'Alene tribe could not employ the *Ex parte Young*, 209 U.S. 123 (1908) exception to the Eleventh Amendment in a suit against the State of Idaho because the subject matter of the suit (ownership of the submerged lands and beds of Lake Coeur d'Alene) implicated Idaho's "special sovereignty interests," despite the fact that no attempt was made to *define* the term. *Id.* at 281, 287-288. And, in *Maine v. Taylor*, 477 U.S. 131 (1985), the Court held that Maine's statutory ban on the importation of live baitfish did not unconstitutionally burden interstate commerce, in part because the ban "serves *legitimate local purposes*[.]" *Id.* at 151 (emphasis added). In each of these cases, the court employed the test without attempting to define the universe of situations that would come within it. Likewise, here, the core-sovereign-function test is workable without having to describe every circumstance in which it might apply.

3. This Court did not reject the Board's proposed rule in *Bonaparte v. Tax Court*.

Hyatt also claims that the Board's rule has been impliedly rejected by this Court in *Bonaparte v. Tax Court*, 104 U.S. 592 (1881), a case that rejected the argument that full faith and credit barred a State from taxing the obligation of another State. According to Hyatt, *Bonaparte* involved "'interference' with 'core sovereign responsibilities,'" and since full faith and credit did not bar that, it should not bar Nevada's refusal here to apply California law. However, *Bonaparte* did not involve a lawsuit against

a defendant State that had raised the issue of applying its own immunity statute. Moreover, it only resulted in trimming a benefit to the non-forum State, it did not involve the type of interference with the tax *process* that exists in this case.

4. The Board's new rule is necessary.

Hyatt asserts that the Board's rule is unnecessary because of the protection already afforded to sister State defendants through comity, interstate compacts, and Congressional action. Any notion that a new rule is unnecessary because of comity, interstate compacts, and Congressional action is put to rest by the fact that this case is ongoing. Moreover, a new rule is necessary because current choice-of-law methodology does not remotely contemplate the cynical use of a State's judicial processes by a plaintiff against his former State of citizenship, to interfere with an ongoing governmental investigation of the plaintiff by the defendant State – especially when that investigation concerns tax obligations that were incurred during the time of plaintiff's former citizenship. In such a context, it is obviously insufficient simply to look at the face of the complaint and consider whether the forum State is competent to legislate in the general area of law encompassed by the allegations. Such an approach ignores the inescapable fact that plaintiff seeks to elevate the status of the forum court to that of a judge over the governmental investigation that is being conducted against plaintiff by the defendant sister State.

Furthermore, the Board's rule is necessary because this case cries out for full faith and credit protection. There must be a solution other than mere reliance on a

forum State's willingness to grant comity, because – as this case shows – comity is no solution. Both the type and amount of interference that the Board has detailed above illustrate that Nevada's refusal to extend full faith and credit has resulted in exactly the evils that Justice Stevens commented on in his concurring opinion in *Allstate*, where he explained that the Full Faith and Credit Clause "would be invoked to restrain 'any policy of hostility to the public Acts' of another State," and would prevent the "parochial entrenchment on the interests of other States." *Allstate Insurance Co. v. Hague*, *supra*, 449 U.S. at 323 n.10 (Stevens, J., concurring).[11]

[11] This Court held long ago that " . . . no state can be said to have a legitimate policy against payment of its neighbor's taxes, the obligation of which has been judicially established by courts to whose judgments in practically every other instance it must give full faith and credit." *Milwaukee County v. M.E. White Co.*, 296 U.S 268, 277 (1935).

CONCLUSION

Based on the foregoing reasons, Petitioner respectfully requests that this Court reverse the order of the Nevada Supreme Court.

Respectfully submitted,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

IN THE MATTER GILBERT P. HYATT CALIFORNIA FRANCHISE TAX BOARD, Petitioner, vs. GILBERT P. HYATT, Respondent.	**CASE NO. 02CS01582** **RESPONDENT GILBERT P. HYATT'S RESPONSE AND OPPOSITION TO THE OSC RE FTB'S PETITION FOR ORDER TO COMPEL COMPLIANCE WITH ADMINISTRATIVE SUBPOENA** **[Declaration of Donald J. Kula in Support of Respondent Gilbert P. Hyatt's Response And Opposition To The OSC Re the FTB's Petition For Order To Compel Compliance With Administrative Subpoena filed concurrently herewith]**

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Respondent Gilbert P. Hyatt hereby submits his response and written opposition to the Court's OSC Re Petitioner California Franchise Tax Board's (the "FTB") Petition for Order to Compel Compliance with Administrative Subpoenas.

I. Issues Presented.

To be enforceable, an administrative subpoena must seek information relevant to the agency's investigation and cannot be too indefinite. Here, the FTB's administrative subpoena from the underlying tax proceedings provides no specificity but rather requests *all* materials from a separate tort case in Nevada. In the underlying tax proceedings, the sole issue is Hyatt's residency in Nevada during a short six month period between September 1991 and April 1992. In the Nevada tort case, at issue is the FTB's later misconduct during its residency audits of Hyatt starting in mid-1993.

Should the Court deny the FTB's petition because the FTB's subpoena is too indefinite and seeks information not relevant to its investigation of Hyatt?

Given the FTB's past threats and current request for irrelevant information about Hyatt, does the subpoena amount to an abuse of process by the FTB?

II. Summary of argument.

Relevance and definitiveness. Taken literally, the FTB's administrative subpoena could be interpreted to include *all* existing and future discovery produced in the Nevada tort case, including that produced under a protective order issued by the Nevada court, all present and future sealed Nevada court filings, and maybe even the privileged or otherwise objectionable materials appropriately withheld by Hyatt in the Nevada tort case. If read in that light, the subpoena is indisputably too broad, too indefinite, and seeks obviously irrelevant material for the tax proceedings. But even a more narrow reading of the FTB's subpoena that would limit the documents sought to those designated by Hyatt under the Nevada protective order does not sufficiently identify the documents requested nor explain their relevance to the tax proceedings.

In response to the subpoena, Hyatt twice asked the FTB before it filed its petition to specify which documents it seeks for the tax proceedings and why they are relevant to the tax proceedings.[1] The FTB ignored both requests. Again, the California tax proceedings and the Nevada tort case involve very different issues and distinctively

[1] *See* M. Hutchison letter, dated June 10, 2002, attached as Exh. C to declaration of Robert Dunn submitted with the FTB petition, and E. Coffill letter, dated July 22, 2002, attached as Exh. A to declaration of Benjamin F. Miller submitted with the FTB petition.

different time periods. The FTB cannot in good faith assert to the contrary, nor has it even attempted to explain how any of the documents specially designated under the protective order from the Nevada tort case have any relevance to the California tax proceedings.[2]

Prior threats/abuse of process. The administrative subpoena was issued by the FTB shortly after it lost a motion in the Nevada case seeking to vacate the protective order. In denying the motion, the Nevada court determined without ambiguity that the protective order is limited in scope and applied to only a small subset of specially designated documents. The FTB's attempt to convey something to the contrary to this Court is misleading and masks its motive for seeking an unnecessarily broad order from this Court. The requested order would make the Nevada protective order a virtual nullity, thereby allowing the FTB to use and disclose the protected materials from the Nevada tort case in any manner it chooses. The FTB has previously threatened to make Hyatt's confidential materials public if he did not agree to settle the tax case.

This is an obvious concern to Hyatt. Before, during, and after the FTB audits of Hyatt, the FTB has declared its intent "to get" Hyatt, threatened the public disclosure of his confidential information if he did not settle, threatened to seek much more of his confidential information if

[2] As set forth below and in the accompanying Declaration of Donald J. Kula, Hyatt has already produced to the FTB in the tax proceedings the relevant information that was designated under the protective order. Materials directly produced in the tax proceedings can be used therein.

he did not settle, threatened to and did surveil him during the Nevada case, and has already in this proceeding temporarily disclosed some of Hyatt's confidential tax information. The administrative subpoena and the relief sought through its current petition are, unfortunately, consistent with the FTB's prior threats to Hyatt.

In sum the FTB stated at the outset of the Nevada tort case that the two proceedings were separate, and that one would not interfere with the other.[3] The FTB now requests something very different from this Court without explaining why "all" materials from the tort case are needed in the tax proceedings. Because the FTB's administrative subpoena is indefinite, seeks documents not relevant to the tax proceedings, and amounts to a manifestation of the FTB's prior threats, good cause exists for the Court to deny the FTB's petition.

III. Statement of the case

A. The tax proceedings have a limited focus: Hyatt's Nevada residency between September 1991 and April 1992.

The FTB's administrative subpoena was issued in relation to tax proceedings the FTB commenced against Hyatt almost 10 years ago, but for which a final determination has yet to be issued by the FTB. The sole issue in the tax proceedings is whether Hyatt became a permanent resident of Nevada in September of 1991 as he contends, or in April of 1992 as the FTB contends. In short, there is

[3] Affidavit of T. Collins, dated March 18, 1998, attached as Exh. A to the Declaration of Donald J. Kula ("Kula Decl.")

a six month period in dispute, and the issue is limited to where Hyatt resided during that time period. A detailed presentation of Hyatt's position, the overwhelming evidence in his favor, and a rebuttal to the Declaration of Bauche (with Exhibits), is set forth in his supplemental protest letter for the 1991 tax year submitted as an exhibit with Hyatt's Motion for a Protective Order to Seal the File.[4]

B. Despite internal FTB dissent regarding whether it even had a tax case against Hyatt, the FTB asserted a fraud penalty against Hyatt.

The FTB uses fraud penalties to bargain with and coerce taxpayers into settling tax disputes. In seminars, the FTB teaches its auditors that penalty assessments are like poker chips to be traded for a settlement.[5] The FTB also uses the sinister "skull-and-crossbones" symbol when teaching auditors about penalty assessments.[6] Shortly following the FTB's proposed assessment of a significant fraud penalty as set forth the Notice of Proposed Assessment dated April 23, 1996 and based on the bogus grounds that Hyatt did not cooperate in the audits,[7] FTB protest

[4] *See* protest letter (attached as Exhibit I to the Kula Declaration submitted with the Motion for a Protective Order to Seal the File)

[5] C. Les. Depo., 226-28, 674-78, 684-87; D. Dick Depo., 87-91, 215-17; C Ford Depo., 128-130; and H 08950-08972, all attached as part of Exh. M to the Kula Decl.

[6] H 08950, attached as Exh. N to the Kula Decl.

[7] *See* Exhibits to Bauche Decl., submitted by FTB in support of its petition.

officer Anna Jovanovich boldly suggested, as described in more detail below, that Hyatt settle the tax dispute or else risk his private information becoming public.

The FTB's assessment of a fraud penalty was made despite internal FTB records (produced in the Nevada case only after the FTB had been denied a writ by the Nevada Supreme Court) that document that the FTB team reviewing the Hyatt 1991 audit (including the lead auditor) concluded that the FTB did not have a "sourcing" case at all or a "residency" case for 1992 against Hyatt,[8] and that even the "reviewer" questioned whether the FTB had any "residency" case against him. The "reviewer" concluded that Hyatt appeared to be a Nevada resident by no later than late 1991, many months before the April 1992 date asserted in the FTB's NPAs for the 1991 and 1992 tax years.[9]

Moreover, one FTB auditor who worked with the lead auditor, openly complained about the conduct of the lead auditor, including that she was obsessed with and "out to get" Hyatt. During her deposition in the Nevada tort case, this auditor testified extensively about the abuse and misconduct directed at Hyatt by the lead auditor.[10]

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[8] Kula Decl., para. 19

[9] Kula Decl, para. 18

[10] C. Les Depo., p. 10-21, attached as Exh. L. to the Kula Decl.

C. The FTB once again falsely asserts that Hyatt did not cooperate in the audits.

A basis for the FTB to assert a fraud penalty is lack of cooperation by the taxpayer. The Bauche declaration submitted by the FTB asserts that Hyatt did not cooperate in the audits. But she does not provide any foundation for her statement made under oath. Instead, Bauche has admitted that she had no knowledge of nor involvement in the audits.[11] She therefore lacks proper first hand knowledge to comment about the audits.

In truth, Hyatt and his professionals promptly responded to all requests from the FTB auditors and produced thousands of pages of documentation to the FTB for the relevant time period in the tax proceedings.[12] Hyatt produced every document in his possession that was requested by the FTB during the tax proceedings, and Hyatt has documented his cooperation in the tax proceedings.[13] The FTB's lead auditor also testified that Hyatt's accountant and tax attorney acted professionally throughout the audits.[14] The bogus non-cooperation claim was made, and continues to be made, by the FTB as a disingenuous attempt to justify its misconduct.

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[11] Bauche Depo., 62, 170-71, 385-386, attached as Exh. E to the Kula Decl.

[12] Kula Decl., paras. 6-9, Exh. C.

[13] *See* Section II. F. 4 (pages 129-130 of the letter) of the Protest letter (attached as Exhibit I to Kula Declaration submitted with Hyatt's Motion for a Protective Order to Seal the File).

[14] S. Cox Depo., 80-81, 726-27, 729 and 731 attached as Exh. D to the Kula Decl.

D. The FTB's large investment in the Hyatt audits caused the FTB to assess Hyatt a significant amount, regardless of whether it was warranted or could ever be collected.

Hyatt contends that FTB auditors and supervisors were motivated, even required, to assess him significant taxes and penalties due to the time incurred in auditing him and the pressure imposed on the FTB auditors to return a profitable "CBR" or Cost Benefit Ratio. FTB witnesses testified in the Nevada case about this CBR.[15] The evidence established that the FTB's auditors recorded 624 hours on the Hyatt 1991 tax-year audit and 1991 tax-year Progress Report, even though the typical audit takes between 100-200 hours.[16] The FTB lead auditor, being evaluated by the CBR method, was consequently motivated to make a significant assessment against Hyatt to justify this extraordinary amount of audit time, regardless of the strength and foundation of the assessment since auditors are evaluated by dollars assessed, not dollars collected.

[15] *See* Deposition of Candace Les, 1, 152-155, 209-211; Deposition of Steve Illia, 80-83, 276-278, 335; Deposition of Jeffrey McKenney, 76-77; Deposition of Sheila Cox, 1916-17; Deposition of Carol Ford, 153-154; Deposition of Monica Embry, 201-202; and Deposition of Allan Shigemitsu, 42-43, all of which are attached as Exh. O to the Kula Decl.

[16] FTB 03477 (also H 08657), attached as Exh. P to the Kula Decl.

E. The Nevada tort case has a very different focus: tortious misconduct by the FTB from 1993 to the present and an attempt by the FTB to coerce a settlement from Hyatt.

Hyatt's Nevada tort claims stem from the FTB's still ongoing almost 10 year investigation, surveillance and audit of Hyatt. But the tort claims, and the discovery related thereto, are focused on the conduct of the FTB during the tax proceedings commenced against Hyatt in mid-1993. In sum, the tax proceedings relate to Hyatt's residency from September 1991 to April 1992, but the tort case relates to the FTB's conduct from mid-1993 to the present.[17]

Specifically in regard to Hyatt's tort claims, he alleges among other things, invasion of his privacy and disclosure, and threatened additional disclosures, of his "taxpayer" information, fraud and extortion based on the threatened disclosure of confidential information and various related torts. Hyatt's motion to seal the file discussed in more detail his invasion of privacy claims.[18]

More relevant here are Hyatt's claims stemming from the FTB's attempt to extort a settlement. The evidence establishes that the FTB's first protest officer, Anna Jovanovich, boldly "suggested" to Hyatt's tax attorney shortly after the "protest stage" of the tax proceedings

[17] *See* Hyatt's Motion for a Protective Order to Seal the File, at 3-6, for a more detailed discussion of Hyatt's claims in the Nevada tort case; *see also* Hyatt's Petition for Rehearing filed in the Nevada tort case (attached as Exhibit A to Kula Declaration submitted with Hyatt's Motion for a Protective Order to Seal the File).

[18] *Id.*

commenced in 1996 that Hyatt settle the matter to avoid Hyatt's personal and financial information being made public. Specifically, she told Hyatt's tax attorney that it would be necessary for the FTB to engage in extensive additional requests for information from Hyatt as that is its practice "in high profile, large dollar" residency audits. In fact, Ms. Jovanovich testified that she told Hyatt's tax representative that in such cases the FTB will conduct an in-depth investigation and exploration "*of many **unrelated** facts and questions*" concerning Hyatt.[19]

F. The Nevada court issued a standard protective order to protect from public disclosure the confidential information produced in that case.

In the Nevada tort case, and as foretold by Jovanovich, the FTB sought a wide range of confidential and private information from Hyatt, ostensibly to defend against Hyatt's claims. The discovery requested by the FTB included Hyatt's confidential business records and personal financial information for time periods well beyond that at issue in the tax proceeding. It also included requests to enter, inspect and videotape Hyatt's *current* residence and business, as well as the home of one or more of his business associates.[20] Not surprisingly, Hyatt sought a protective order that allowed production of the

[19] Jovanovich depo., Vol. I, pp. 50-52, 168, 185-186 (emphasis added), attached as Exh. F to the Kula Decl.

[20] Kula Decl., para. 11.

potentially relevant information in the tort case, but also limited its use to that case.[21]

G. The FTB understands that the Nevada protective order is limited.

The FTB would have this Court believe that the Nevada protective order applies to every document in the Nevada tort case. In a motion seeking to vacate the protective order, the Nevada court denied that motion and confirmed that the protective order applies to only a small subset of documents that have been specially designated "Confidential – NV Protective Order."[22] Moreover, the protective order itself is clear that only documents affirmatively stamped "Confidential – NV Protective Order" by a party are designated under, and subject to, the order. Correspondence regarding the drafting of the protective order also confirmed the need to stamp documents with the special designation.[23]

Indeed the declaration of Robert Dunn submitted with the FTB's petition acknowledges the distinction that some documents are designated under the protective order, while most of the documents in the Nevada case are

[21] Kula Decl., paras. 10, 12-15, *see also* copy of the Nevada protective order attached as Exh. F to the Declaration Robert W. Dunn submitted with the FTB's petition.

[22] Transcript from January 17, 2002 hearing, pp. 21, attached to the Kula Decl.; *see also* Hyatt Opposition to FTB's Motion to Vacate Protective Order, pp. 7-11 and 15-18, attached as Exh. O to the Kula Decl.

[23] D. Kula letter dated November 22, 1999; J. Steffen letter dated December 14, 1999, both attached as Exh. H to the Kula Decl.

merely stamped "Confidential."[24] Finally, the FTB has designated select materials as "Confidential – NV Protective Order."[25] The FTB therefore understood, and still understands, the special designation needed for documents to be designated under the protective order. The FTB's current argument that the whole case file may be subject to the protective order is disingenuous.

H. The FTB ignored Hyatt's requests to clarify and focus the subpoena.

In June of this year –after losing the motion to vacate referenced above and prior to issuing the administrative subpoena – the FTB's lead Nevada counsel, Felix Leatherwood, Esq., sent a written request to one of Hyatt's Nevada counsel, Mark Hutchison, Esq., asking that Hyatt allow all material designated by Hyatt under the Nevada protective order to be submitted in the tax proceedings. Mr. Hutchison responded by seeking clarification and specification of the documents requested and also asking if the FTB would agree to keep confidential and not publicly disclose any information produced under the protective order and submitted to the tax proceedings.[26] The FTB did not respond, other than to issue the administrative subpoena.

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[24] *See* Declaration of Robert Dunn, para. 4, submitted with FTB's petition.

[25] Kula Decl., paras. 17-20.

[26] M. Hutchison letter, dated June 10, 2002, attached as Exh. C to declaration of Robert Dunn submitted with the FTB petition.

In July of this year, in response to the administrative subpoena, Hyatt's lead counsel in the tax proceedings, Eric Coffill, Esq., sent a written response to the subpoena seeking clarification regarding the six categories listed in the subpoena and specification regarding which of the documents designated under the protective order the FTB was seeking. Mr. Coffill's letter also stated a relevancy objection to the subpoena citing the limited nature of the dispute in the tax proceedings.[27] The FTB did not respond to Mr. Coffill's letter.

IV. Legal argument.

A. California law and the Fourth Amendment require that administrative subpoenas seek only relevant information and not be too indefinite.

The FTB's petition acknowledges that an administrative subpoena must seek information reasonably relevant to the underlying proceeding and not be too indefinite. More specifically, the FTB's specific subpoena power under Section 19504 of the Revenue and Taxation Code provides that the information must be "relevant" to "ascertaining the correctness of [taxpayer's return]. . . . " Information sought through administrative subpoenas in general must be "*pertinent or material* to any inquiry, investigation, hearing, proceeding, or action conducted in any part of the state."[28]

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[27] E. Coffill letter, dated July 22, 2002, attached as Exh. A to declaration of Benjamin F. Miller submitted with the FTB petition.

[28] Cal. Gov't Code § 11181(e).

In addition, the California Supreme Court has established guidelines defining the permissible reach of an administrative subpoena duces tecum issued under Government Code section 11181. In *Brovelli v. Sup. Ct.*,[29] the California Supreme Court explained that department heads cannot compel production of evidence in disregard of constitutional rights and safeguards. The Court stated that:

> Insofar as the prohibition against unreasonable searches and seizures can be said to apply at all requires only that the inquiry be one which the agency demanding production is authorized to make, that the demand be not too indefinite, and that the information sought be reasonably relevant.[30]

In short, administrative subpoenas cannot violate the United States Constitution's Fourth Amendment prohibition on illegal searches and seizures.[31]

B. An administrative subpoena will not be enforced if it intrudes on an individual's constitutional privacy rights.

In *Board of Medical Quality Assurance v. Gherardini*,[32] the court held that the constitutional right to privacy safeguards an individual from government data

[29] 56 Cal.2d 524, 529 (1961).

[30] *Id.*

[31] *Craib v. Bulmash*, 49 Cal. 3d 475, 484 (1989).

[32] *Board of Medical Quality Assurance v. Gherardini, supra*, 93 Cal.App.3d 669.

gathering, absent a showing of waiver or good cause. "The state of a person's gastro-intestinal tract is as much entitled to privacy from unauthorized public or bureaucratic snooping as is that person's bank account, the contents of his library or his membership in the NAACP."[33]

Citing to *White v. Davis*[34] and other California Supreme Court precedent,[35] the *Gherardini* court condemned "Government agencies [that] seem to be competing to compile the most extensive sets of dossiers of American citizens." It condemned the "[c]omputerization of records [that] makes it possible to create 'cradle-to-grave' profiles of every American."[36]

Gherardini held that administrative agencies are not in any "special or privileged category, exempt from the right of privacy requirements, which must be met and honored generally by law enforcement officials."[37] To hold any differently would ignore the federal and state constitutional commands. While agencies have unquestioned rights to investigate, they cannot ignore individuals' "constitutional and statutory rights to be left alone."[38] That right includes, at a minimum, "one's confidential

[33] *Id.* at 679.

[34] 13 Cal. 3d 757, 775 (1975), modified by *Hill v. NCAA*, 7 Cal. 4th 1, 34-35 (1994)

[35] *Gherardini, supra*, at 677-78, citing *People v. Privitera*, 23 Cal. 3d 697, 709 (1979)

[36] *Id.*, citing *Privitera* at 709.

[37] *Id.* at 679-80.

[38] *Id.* at 680.

financial affairs as well as to the details of one's personal life."[39]

Gherardini imposed requirements far beyond mere relevance. It held that:

> Beyond the showing of relevance, materiality to the investigation, *it is encumbent on the Medical Board to show that the patient's constitutional rights are not infringed.* If disclosure is to be compelled after the requisite balancing of the juxtaposed rights, and the finding of a compelling state interest, then it should be accomplished *only by an order drawn with narrow specificity*. By interposition of such minimal due process requirements the mandate of *Katz v. United States*, [citation]; *Griswold v. Connecticut*, [citation], and article I, section 1, of the California Constitution will be fulfilled and Evidence Code Section 1007 held constitutional. Only by such procedure may the requisite balancing of the private and the state interest be effected.[40]

In this matter, the FTB seeks, on the face of its subpoena, a massively overbroad amount of documents: "All" materials from the Nevada tort case. As explained further below, the FTB makes no attempt to explain how or why it needs this information in the tax case, particularly when the tax case, is in effect, concluded.

[39] *Id.* at 680, citing and quoting from *Valley Bank of Nevada v. Superior Court (Barkett)*, 15 Cal. 3d 652, 656 (1975).

[40] *Id.* at 681-82.

In that regard, under the holding in *Wood v. Superior Court, (Board of Medical Quality Assurance)*,[41] the FTB has failed to even submit the necessary declarations establishing the need for the requested information in the tax proceedings. *Wood* relied upon *Gherardini* and required the Attorney General to show that the stage agency had no alternative means of securing its legitimate objectives. It required the agency to show that no less intrusive measures could be devised to avoid or minimize the conflict with privacy.[42] It reasoned that since the Board was only interested in evidence of wrongdoing, it had to narrowly tailor the subpoena to winnow out records that were irrelevant and immaterial to the propriety of the prescriptions.[43] The Court of Appeals held that absent the particularized showing, the Superior Court has no means by which to gauge the likelihood that the records sought will reveal misconduct. "Without this there can be no independent judicial assessment of good cause. The *judicial* function of assessing cause cannot be abdicated by deferring to the bare conclusions of board personnel."[44]

C. The FTB makes no showing of the need for the unidentified documents.

The FTB cannot demonstrate the relevancy of its subpoena requests, nor can it state with precision the

[41] *Wood v. Superior Court, (Board of Medical Quality Assurance)*, 166 Cal. App. 3d 1138 (1985).

[42] *Id.* at 1148.

[43] *Id.* at 1148-49.

[44] *Id.* (emphasis in original, citation to 8 *Wigmore on Evidence* § 2195 (McNaughton rev. ed. 1961) omitted).

documents that it seeks. While not presented in this Court, in the FTB's motion to vacate the protective order in the Nevada case, the FTB provided its only explanation as to why certain of the documents designated under the protective order were requested for the tax proceedings, including the deposition transcript of Mike Kern referenced in the subpoena.

The FTB cited its desire to use the Kern deposition transcript relating to Hyatt's stay at the Continental Hotel during September and October of 1991. The FTB claimed it needed this information in the tax proceeding.[45] What the FTB does not tell the Court is that, in the tax proceeding, Hyatt has already submitted the relevant information that he has regarding his stay at the Continental Hotel, including his statement of the exact dates he stayed there.[46] Further, Hyatt did not meet Mr. Kern until long after the time of Hyatt's stay at the Continental Hotel. Mr. Kern's brief testimony during his deposition in this case was simply about his 1996 inquiry seeking information and documents from the Continental Hotel.

In its motion to vacate the protective order, the FTB also cited to licensing agreements entered into by Hyatt. But Hyatt long ago produced to the FTB all the licensing agreements relevant to the time period at issue in the tax proceedings between late September 1991 and early April 1992.[47] To the extent the FTB desires to use licensing

[45] Kula Decl., para. 15, Exh. I (*see* pp. 10-11 thereto).

[46] *See* Protest letter attached to prior Kula declaration (Exhibit I thereto, p. 12 of the Protest letter) filed in Support of Hyatt's Motion for a Protective Order to Seal the File.

[47] Kula Decl., para. 15, Exh. I (*see* pp. 10-11 thereto).

agreements for the subsequent years in the tax proceeding, the FTB gives no explanation why or how they are relevant to the tax proceedings.

Finally, a significant number of the documents designated by Hyatt under the Nevada protective order were in fact voluntarily produced to the FTB in the audits and protests.[48] Hyatt's designation of those documents under the Nevada protective order does not therefore prohibit their use in the audits and protests. This too was made clear in the protective order[49] and confirmed later when the FTB moved to vacate the protective order.[50]

In sum, the documents designated by Hyatt under the protective order are made up either of documents that are irrelevant (e.g., outside of the six month disputed residency period) or documents that Hyatt has already produced to the FTB (e.g., license agreements that were signed within the disputed period). The FTB has made no attempt here, nor in response to Hyatt's request to meet and confer, to explain why it needs any of the material that have been designated under the Nevada protective order *that it has not already received directly in the audits or protests*, or for that matter any of the materials filed under seal in Nevada or any of the privileged material Hyatt properly withheld in the Nevada tort case. This is

[48] Kula Decl., paras. 6-9.

[49] *See* Nevada Protective Order, para. 11, attached to the Declaration of Robert Dunn submitted with the FTB's petition.

[50] Transcript from January 17, 2002 hearing, pp. 21-24, attached as Exh. J to the Kula Decl.; *see also* Hyatt Opposition to FTB's Motion to Vacate Protective Order, pp. 7-11, 15-18, attached as Exh. I to Kula Decl.

despite the fact that the FTB submitted with its petition declarations from two of the attorneys intimately involved with the Nevada tort case (Felix Leatherwood, Esq., Robert Dunn, Esq.,). Each is familiar with all materials filed and produced in the Nevada tort case, but neither provides a description of the particular documents that may be relevant to the tax proceedings. It can therefore be inferred that there are no additional documents not already in the FTB protest officer's possession that were designated under the Nevada protective order, or otherwise first obtained by the FTB in the Nevada tort case, relevant to the tax proceedings.

D. Enforcement of the FTB's subpoena would be an abuse of process.

1. Courts will not enforce bad faith subpoenas, i.e. those issued for an ulterior purpose and intended to intimidate or coerce a settlement.

In *United States v. Powell*,[51] the United States Supreme Court upheld an IRS subpoena over a bad faith challenge, but stated it would refuse to enforce a subpoena where there was an abuse of process based on the bad faith of the agency in issuing the subpoena. The Court gave this example:

> It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been

[51] *United States v. Powell*, 379 U.S. 48 (1964).

> issued for an improper purpose, such as to harass the taxpayer *or to put pressure on him to settle a collateral dispute*, or for any other purpose reflecting on the good faith of the particular investigation. The burden of showing an abuse of the court's process is on the taxpayer. . . .[52]

Hyatt has set forth in detail in this opposition, his motion to seal the file, and his initial *ex parte* application the FTB's attempts to intimidate and coerce him into a settlement through threats of disclosing his confidential information. Given the lack of relevance to the tax proceedings of the documents protected under the Nevada protective order, the refusal of the FTB to respond to Hyatt's requests for clarification of the requested documents, and the FTB's conduct in this case in filing Hyatt's tax information in open court and vigorously opposing Hyatt's request to seal the file, an obvious inference is that the FTB is still trying to intimidate and coerce Hyatt by issuing the subpoena and seeking irrelevant documents (as Ms. Jovanovich promised to do should Hyatt choose not to settle). The FTB's petitions should therefore be denied.

2. In addition to intimidation and coercion, the FTB seeks enforcement of the subpoena to negate the protections accorded Hyatt under the Nevada protective order.

Two the of the declarations submitted by the FTB in support of its petition are from attorneys involved in the

[52] *Id.*, at 58 (emphasis added and footnote omitted).

Nevada tort case (Felix Leatherwood, Esq., and Robert Dunn, Esq.,). Again, each is well acquainted with the documents Hyatt has designated under the Nevada protective order and could have provided insight into why the FTB believes they may be relevant to the tax proceedings. The FTB could have issued and sought enforcement of a limited subpoena that specifies the documents needed in the tax proceedings. The FTB chose not to do so.

Instead, the FTB seeks a blanket order allowing use of all discovery materials from the Nevada case in the tax proceedings. The FTB does not want to be constrained by the Nevada protective order, even with regard to documents irrelevant to the tax proceedings, and it asks this Court to give it authority to disregard the Nevada protective order. In that regard, the FTB's failed attempts to vacate the Nevada protective order in Nevada were described above. There is no escaping the conclusion that the FTB wants to eliminate the Nevada protective order so that it has free reign to make Hyatt's confidential documents public as it threatened to do. This is an improper purpose for the relief sought by the FTB from this Court.

In that regard, the FTB's lead counsel in the Nevada tort case, Mr. Leatherwood, has routinely expressed open contempt for the Nevada court and his threatened to seek review of its orders in California Superior Court.[53] But that is not the function of this Court, nor can it be under the Full Faith and Credit Clause of the United States Constitution.[54] Under the Full Faith and Credit Clause,

[53] *See* Kula Decl., para. 21 and Exh. K thereto.

[54] U.S. Const. Art. IV, Sec. I.

the Nevada protective order is entitled to all the respect and solemnity of any other judicial ruling from a sister state or another California court, despite Mr. Leatherwood's expressed contempt for the order and the Nevada court.

V. Conclusion.

The FTB has not and cannot establish that "all" of the material from the Nevada tort case is relevant to the tax proceedings. The FTB also fail to identify and describe the documents it seeks to compel Hyatt to produce. The petition, as well as the subpoena, manifest the threats previously made by the FTB and constitute an abuse of process. For all these reasons, Hyatt respectfully requests that the Court deny the FTB's petition.

DATED: November 26, 2002

RIORDAN & McKINZIE
A Professional Law Corporation

By: /s/ Donald J. Kula
Donald J. Kula
Attorneys for Respondent
GILBERT P. HYATT

PROOF OF SERVICE BY EXPRESS MAIL OR OTHER EXPRESS SERVICE

STATE OF CALIFORNIA COUNTY OF LOS ANGELES

I am employed in the county aforesaid; I am over the age of 18 years and not a party to the within action; my business address is 300 South Grand Avenue 29th Floor, Los Angeles, CA 90071-3109.

On November 26, 2002, I served the foregoing document(s) described as **RESPONDENT GILBERT P. HYATT'S RESPONSE AND OPPOSITION TO THE OSC RE FTB'S PETITION FOR ORDER TO COMPEL COMPLIANCE WITH ADMINISTRATIVE SUBPOENA** on interested parties in this action by placing a true copy thereof in a sealed envelope or other package designated by the express service carrier, at Los Angeles, California, addressed and numbered as follows:

Molly Mosley, Esq.
Attorney General
Department of Justice
1300 I Street, Suite 125
Sacramento, CA 95814

I am readily familiar with this firm's practice of collection and processing correspondence for mailing and overnight delivery. Under that practice, it would be deposited on that same day in the ordinary course of business at Los Angeles, California,

Executed on November 26, 2002, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ Sophia Thompson
Sophia Thompson

(8)

No. 02-42

Supreme Court, U.S.
FILED
DEC 9 2002

IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a taxpayer who moves from one State to another can collaterally attack a tax assessment by his former State in the courts of his new State of residence.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* and their members have a compelling interest in legal issues that affect state and local governments.

The Court has long recognized that "'[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.'" *National Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995) (quoting *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871)). The Court has also noted that "[t]he procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules." *Fair Assessment In Real Estate Ass'n v. McNary*, 454 U.S. 100, 108 n.6 (1981) (citation and internal quotation omitted).

Respondent's Nevada civil action against the California Franchise Tax Board—a collateral attack on California's tax collection scheme—violates these vital principles. Respondent alleges that he "is and was at all times pertinent . . . a bona fide resident of Nevada [who] should not be forced into a California forum to seek relief from the unjust and tortious attempts by the FTB to extort unlawful taxes from" him. Pet. App. 57a (Complaint ¶ 17). California provides taxpayers a

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members made a monetary contribution toward its preparation or submission.

remedy, which respondent has invoked, Pet. 3, 10, to challenge the FTB's residency audit and proposed assessments. The Nevada Supreme Court has nonetheless ruled that Nevada's courts have jurisdiction over respondent's intentional tort claims against the Board and that respondent can proceed with further discovery and a trial. This holding poses a substantial threat to the effective administration of state tax laws and the system of cooperative federalism, which is the foundation of the Constitution.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

STATEMENT

1. Following a residency audit of respondent Hyatt, petitioner California Franchise Tax Board made the preliminary determination that Hyatt had remained a California resident until April 1992 and thus owed tax on an additional $ 40 million in income that he had earned while a California resident but had failed to report on his last California tax return. *See* Pet. 3. The Board thus issued respondent Notices of Proposed Assessment for tax years 1991 and 1992. *See id.* In addition to back taxes, the Notices sought to impose a civil fraud penalty. *See id.* Respondent Hyatt filed an administrative protest against the assessments with the Franchise Tax Board, which remains pending in California. *See id.*

Under California law, the protest proceeding is a de novo review and the taxpayer is entitled to a hearing. *See* Cal. Rev. & Tax Code § 19044. In the event of an adverse decision, the taxpayer is entitled to a further de novo hearing before the State Board of Equalization. *See id.* §§ 19045, 19046. Thereafter, the taxpayer can seek judicial review, which in the case of a challenge to a residency determination can be commenced without payment of the assessment. *See id.* § 19381; Cal. Civ. Code § 1060.5.

2. Although his California administrative protest "could result in modification or withdrawal of the FTB's proposed assessments," Pet. 10, Hyatt filed this lawsuit against the FTB in Nevada state court. *Id.* at 3. In the suit, respondent alleged that he "is and was at all times pertinent . . . a bona fide resident of Nevada [who] should not be forced into a California forum to seek relief from the unjust and tortious attempts by the FTB to extort unlawful taxes from this Nevada resident." Pet. App. 57a (Complaint ¶ 17). Respondent further alleged that the "manufactured issue of his residency in Nevada for the period of September 26 through December 31 of 1991 should be determined in Nevada, the state of plaintiff's residence." *Id.* Respondent thus sought a declaratory judgment that he was a Nevada resident "commencing on September 26, 1991" through the present and that "the FTB has no jurisdiction to impose a tax obligation on plaintiff during the contested periods." *Id.* at 64a-65a (Complaint ¶ 31).

Respondent's complaint's further alleged that the FTB had committed six different intentional torts in the course of its residency audit. Each of these claims re-alleges respondent's assertions regarding his residency in Nevada, *see id.* at 52a-54a, the FTB's investigation of his residency, *see id.* at 54a-56a, the FTB's proposed assessment for 1991, *see id.* at 56a-57a, the FTB's proposed assessment for 1992, *see id.* at 58a, and the FTB's motive. *See id.* at 60a-61a; *see also id.* at 65a; 67a-68a; 69a; 70a; 72a; 78a. Each claim also asserts that the FTB's conduct was "malicious" and "oppressive," thus entitling respondent to an award of punitive damages. Pet. App. 67a, 68a, 70a, 71a, 77a, 84a.

Hyatt's complaint asserts three claims of the common law tort of invasion of privacy. Two of these claims allege that 1) the FTB unreasonably intruded on respondent's seclusion, and 2) that the FTB gave unreasonable publicity to private facts by disclosing "personal and confidential information" to

third parties during the course of the residency audit. *Id.* at 66a, 68a. The third invasion of privacy claim alleges that the FTB cast respondent "in a false light" by "insinuating to . . . Nevada residents" in the course of interviewing witnesses "that [Hyatt] was under investigation in California, thereby falsely portraying [him] as having engaged in illegal and immoral conduct." *Id.* at 69a.

Hyatt's complaint also included common law claims of outrage, abuse of process, and fraud. The outrage claim alleges that "the true purpose of [the FTB's investigation] was to . . . harass, annoy, embarrass, and intimidate plaintiff, and to cause him such severe emotional distress and worry as to coerce him into paying significant sums to the FTB irrespective of his demonstrably bona fide residence in Nevada throughout the disputed periods." *Id.* at 71a.

The abuse of process claim likewise alleges that the FTB's agents issued unlawful administrative subpoenas to Nevada residents and businesses "for the ulterior purpose of coercing plaintiff into paying extortionate sums of money to the FTB without factual or constitutional justification, and without the intent or prospect of resolving any legal dispute." *Id.* at 73a. This claim further alleges that the FTB abused its powers "by assessing . . . huge penalties based on patently false and frivolous accusations" that Hyatt concealed assets and "fraudulently claim[ed] Nevada residency." *Id.* at 75a.

Hyatt's final intentional tort claim alleged that the FTB committed fraud by disclosing his address in subpoenas issued to several Las Vegas utility companies in violation of assurances given by the Board to his representatives. *See id.* at 78a-79a. Hyatt further alleged that the FTB committed fraud by making false assurances "that the audit was to be an objective inquiry into the status of his 1991 tax obligation," *id.* at 82a, which induced him to provide the FTB with confidential information. *See id.* at 84a. As part of the fraud count, Hyatt furthers alleges "that the FTB has no credible

evidence, and can . . . provide none, that would indicate that [he] continued to own or occupy his former home in . . . California," *id.* at 82a-83a, that the FTB ignored evidence that he had reported the sale of his California home on his 1991 tax return (to his self-described business associate) and instead declared the sale of his California home "a 'sham.'" *Id.* The complaint further alleges that the FTB committed these acts with the "intent of defrauding plaintiff into believing that he would owe an enormous tax obligation to the State of California." *Id.* at 83a.

3. The FTB moved for judgment on the pleadings on the ground that the Nevada courts lacked subject matter jurisdiction. *See* Pet. 4. The trial court dismissed the declaratory relief claim but denied the FTB's motion with respect to the tort claims. *See id.* The FTB filed a subsequent motion for summary judgment on the tort claims and also moved again to dismiss for lack of jurisdiction. The trial court, however, denied the motions.

The FTB then filed a petition for a writ of mandamus ordering dismissal in the Nevada Supreme Court. The court granted the petition, notwithstanding the "extraordinary" nature of the writ, Pet. App. 40a, on the ground that its review of the record "revealed that there is no probative evidence to support Hyatt's claims." *Id.* at 41a. The court explained that "[t]he myriad depositions and documents submitted to this court are undisputed and indicate that Franchise Tax Board's investigative acts were in line with a standard investigation to determine residency status for taxation pursuant to its statutory authority." *Id.* at 42a-43a. The court reasoned that "[m]erely because a state agency is performing an investigation in the course of its duties does not automatically render its acts an invasion of privacy or otherwise intentionally tortious absent evidence of unreasonableness or

falsity of statements." *Id.* at 43a. The court therefore ordered the trial court to grant the FTB's motion for summary judgment. *See id.* at 43a.

Thereafter, respondent petitioned for rehearing. *See* Pet. App. 6a. Nine months later, and without oral argument, the Nevada Supreme Court granted the petition, vacated its previous order, and reinstated respondent's intentional tort claims. *See id.* at 6a-7a. Other than to state that it had "considered the parties' documents and the entire record before us," *id.* at 6a, the court provided no explanation for the reversal of its earlier order dismissing the case for lack of evidence. *See generally id.* at 6a-16a.

The court then rejected the FTB's arguments that the Nevada courts lack subject matter jurisdiction over Hyatt's suit. *See id.* at 10a-11a. The court perfunctorily rejected the FTB's contentions that the doctrines of administrative exhaustion and sovereign immunity barred the suit. *See id.* at 10a. The court further held that the Full Faith and Credit Clause did not require Nevada's courts to apply California's law of sovereign immunity on the ground that "Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment." *Id.* at 12a. Because "Hyatt's complaint alleges that [FTB] employees conducted the audit in bad faith, and committed intentional torts during their investigation," the court concluded that the Nevada courts have jurisdiction over the intentional tort claims. *Id.* at 12a-13a.

4. The case has already generated an immense amount of discovery as the Nevada trial court ruled that "the entire process of the FTB audits of Hyatt, including the FTB assessments of taxes and the protests, is at issue in this case and a proper subject of discovery." Discovery Commissioner's Report and Recommendation, *Hyatt v. Franchise Tax Board* 3 (Nev. Dist. Ct., Dec. 7, 1999) (No. A382999)

(quoted in FTB Petition For Writ of Mandamus 20, *Franchise Tax Board v. Eighth Judicial Dist. Ct., et al.* (Nev. 2001) (No. 36390)). The trial court further ruled that "Hyatt's claim of fraud against the FTB entitles him to discovery on the entire audit and assessment process performed by the FTB that was and is directed at him as part of the FTB's attempt to collect taxes from Hyatt." *Id.*[2]

---

[2] The broad scope of Hyatt's discovery requests is best demonstrated by the remarks of the Nevada discovery commissioner, in response to the State's attempt to limit discovery to those acts occurring within Nevada. During the discovery hearing (Nov. 9, 1999), the commissioner, after noting "the [trial] Court's failure to limit the issues in this case any more than the Court did, [so] that the plaintiff was entitled to press the case in all of the counts alleged in the complaint," explained that "the heart of the case is the process by which the FTB conducted this audit, including but not limited to those parts of the audit which intruded into the state of Nevada." Tr. 70-72, Nov. 9, 1999 (reprinted in FTB Mandamus Pet. 21) (No. 36390).

In this same hearing the discovery commissioner observed that "there is concern countrywide about the tax collecting services using methods that are not appropriate and, you know, we are all completely aware of that in regard to the IRS and methods like that, and I think that these processes should be explored." *Id.* at 55-56 (reprinted in FTB Mandamus Pet. 20). Responding to the FTB's point that Hyatt had ample remedies to challenge the tax in California, the commissioner added:

> You indicate that Mr. Hyatt has all of his rights and remedies in California to challenge the tax. I don't know if those rights and remedies include exploration of the process and availability to all the information that he could get by way of the claims that the Court has left intact here. If there is fraud to be discovered, I think it should be discovered on one side or the other.

Id. Later the commissioner reiterated that:

> [T]he process I think is still fair game, and if you think otherwise you will have to have the judge say that because obviously in my view if we are only concerned with acts that took place in the state of Nevada, then we would have a very small range of discovery in this case because I think everybody is in agreement [that] there were only some few certain acts done in Nevada, investigation by the

Taking full advantage of these rulings, respondent's lawyers have engaged in discovery on a vast scale. At the time the FTB moved for summary judgment in January 2000, respondent's lawyers had taken 315 hours of testimony from 24 witnesses, made 329 separate document demands from the FTB (which produced over 17,000 pages of documents), and propounded an additional 340 document requests to deposed witnesses. *See* FTB Motion for Summary Judgment 4, *Hyatt v. Franchise Tax Board* (Nev. Dist. Ct. 2000) (No. A382999).

SUMMARY OF ARGUMENT

A. Respondent's tort claims are an attempt to collaterally attack the FTB's residency audit and proposed assessments in the Nevada courts. While cast in the lexicon of intentional torts, each of his claims is a variation on the theme that he became a bona fide resident of Nevada before he received $40 million in licensing fees, and that the FTB is unjustly attempting to extort taxes from him because it disputes his assertions as to the commencement of his Nevada residency. Indeed, the Nevada trial court has acknowledged this, as evidenced by the discovery commissioner's statement that while "there were only some few certain acts done in Nevada" by the FTB, these acts were "only a part of the process of collecting the tax from Mr. Hyatt, and the process is what is under attack here." FTB Mandamus Pet. 22 (quoting Tr. 72-74 (Nov. 9, 1999)).

> FTB on premises, so to speak, here as well as inquiring with various Nevada companies and other things, but that in my view is only a part of the process of collecting the tax from Mr. Hyatt, *and the process is what is under attack here*, and I think in my view, particularly a state agency should feel that its process should be open to exploration in a case such as this so that we have an open form of government.

Id. at 72-74 (reprinted in FTB Mandamus Pet. 22) (emphasis added).

B. This Court has long recognized the importance of state tax systems and the need to avoid illegitimate and abusive interference with a State's authority to collect taxes. The Court has applied this principle regardless of the nature of the relief sought. *See Fair Assessment In Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981). While the rule has its origin in the need to avoid federal court interference with state tax administration and is based on the Court's longstanding and "scrupulous regard for the rightful independence of state governments," *id.* at 111, this reasoning powerfully demonstrates that respondent's suit poses a "substantial threat to our constitutional system of cooperative federalism." *Nevada v. Hall*, 440 U.S. 410, 424 n.24 (1979).

Tort suits for punitive damages against a taxing authority would manifestly interfere with a State's "capacity to fulfill its own sovereign responsibilities." *Id.* If the courts of the national sovereign must yield to state tax procedures even when federal constitutional rights are implicated, then surely a State cannot exercise jurisdiction over tort claims brought to collaterally attack another State's tax proceeding. The Nevada courts' exercise of jurisdiction over respondent's suit is without justification as California law provides respondent with adequate and complete remedies for contesting the FTB's proposed assessments, including two levels of administrative review and the right to judicial review without having to first pay the final assessment.

C. While Nevada is a sovereign co-equal in status to California, its courts' exercise of jurisdiction over this suit is not within their discretion. Rather, structural principles of the Constitution preclude Nevada jurisdiction over this case.

The first of these is the principle that commands the various sovereigns in the federal system to avoid unwarranted interference with the governmental operations of other sovereigns. *See, e.g., Metcalf & Eddy v. Mitchell*, 269 U.S. 514 (1926); *Ambrosini v. United States*, 187 U.S. 1 (1902). For

example, this Court has derived from the Constitution the intergovernmental tax immunity, which "rests on the law of self-preservation, for any government, whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government, exists only at the mercy of the latter." *Ambrosini*, 187 U.S. at 7. Few suits involve a greater interference with a State's administration of its sovereign functions than a collateral attack on its tax proceeding, especially where, as here, that attack summons the taxing State to answer in another State's courts and seeks punitive damages as well.

The second principle is found in the Court's cases interpreting the Extradition Clause, which is the Constitution's other provision (besides the Full Faith and Credit Clause) expressly mandating interstate comity on a government to government basis. The Court's cases interpreting the Extradition Clause have repeatedly rejected fugitives' attempts to collaterally attack the charging State's criminal proceedings. The Court has rejected challenges to the legal merit of a charge and to the fairness of criminal proceedings in the courts of the charging State. *See California v. Superior Court of California*, 482 U.S. 400 (1987); *Puerto Rico v. Branstad*, 483 U.S. 219 (1987).

As these cases recognize, the preservation of interstate harmony is best achieved by mandating jurisdictional limitations that prohibit the use of the asylum State's judicial processes to interfere with the charging State's proceeding. The respect which the States owe each other as co-sovereigns in the federal system precludes a State from questioning the integrity and fairness of another State's administrative and judicial processes.

Preventing tax evasion by those who cross state lines is as important to interstate harmony as ensuring that fugitives are returned for trial or incarceration. Moreover, respondent's tort suit involves a far greater interference with California's

sovereignty than is typically implicated in extradition, as a charging State is not summoned into another State's courts without its consent. Likewise, the charging State is not threatened with the possibility of an award of punitive damages. Indeed, if California had charged respondent with criminal tax fraud, there would be little doubt that this Court's precedents would prevent him from bringing a tort suit in Nevada challenging the process that led to the charge.

ARGUMENT

ONE STATE'S COURTS CANNOT ADJUDICATE A TAXPAYER'S COLLATERAL ATTACK ON ANOTHER STATE'S TAX PROCEEDING

The Supreme Court of Nevada erred in failing to dismiss respondent's intentional tort claims against the California Franchise Tax Board. While the Nevada courts correctly recognized the impropriety of adjudicating respondent's claim seeking a declaratory judgment that he was a Nevada resident at the times material to the FTB's proposed assessments, the state supreme court's judgment reinstating the intentional tort claims opens a Pandora's box for state tax administration and poses a grave threat to the federal system.

As explained below, respondent's intentional tort claims are simply an attempt to collaterally attack the Franchise Tax Board's residency audit and its proposed imposition of back taxes and a civil fraud penalty. Affirmance of the Nevada court's exercise of jurisdiction in this dispute—which seeks both compensatory and punitive damages from the California Franchise Tax Board—would be especially problematic in light of the highly mobile nature of modern economic activity.

Under our federal system, both workers and businesses are free to move to any State in the Union. Moreover, workers can choose to reside in one State and work or operate a business in another. *See, e.g., Lunding v. New York Tax*

Appeals Tribunal, 522 U.S. 287 (1998). Similarly, firms can set up their headquarters in one State and conduct business in any other State. Given the large volume of economic activity that involves the crossing of state boundaries, it is obvious that States must be able to conduct audits of non-resident taxpayers without being subjected to tort suits and potentially massive punitive damages liability in the courts of the taxpayer's asserted State of residence.

While *amici* agree with California that the Full Faith and Credit Clause requires the Nevada courts to apply California law and dismiss respondent's suit, this case does not simply involve a matter of whether California or Nevada law applies. To illustrate, California provides a remedy to a taxpayer "aggrieved" if a Board employee "recklessly disregards board published procedures." Cal. Rev. & Tax Code § 21021(a). If the Nevada courts had decided to apply this provision to respondent's suit, it would nonetheless be improper for them to exercise jurisdiction over the claim. Rather, the structure of the Constitution prohibits a State from allowing its citizens to use its courts to adjudicate a taxpayer dispute against another State even when the claim is based on the remedial provisions of the taxing authority.

This is not to deny a State's legitimate interest in protecting its citizens from tortious conduct committed by the employees of another State occurring within its borders. But where, as here, a claim is simply a collateral attack on the taxing State's assessment, the forum State is not entitled to recognize that interest over the structural limitation on adjudicating another State's tax proceeding. The judgment of the Supreme Court of Nevada should therefore be reversed.

A. Respondent's Nevada Suit Is A Collateral Attack On California's Residency Audit And Proposed Assessments

Respondent's tort claims are an attempt to collaterally attack the FTB's residency audit and proposed assessments. As explained above, each of respondent's tort claims is simply a variation on the same theme: that Hyatt became a bona fide Nevada resident before he received $ 40 million in licensing fees, and that the FTB is unjustly and tortiously attempting to extort taxes from him because it disputes his assertions as to the commencement of his Nevada residency. *See* discussion *supra* at 3-5. This is made clear by Hyatt's complaint, which states no claim of injury that is independent of the FTB's auditing process and assessments, and which in its most candid moment asserts that he "should not be forced into a California forum to seek relief" from the FTB's assessments. Pet. App. 57a.[3]

That respondent's claims are nothing more than a collateral attack on the FTB's assessments is confirmed by the discovery commissioner's understanding of the case. As the commissioner stated, "the heart of the case is the process by which the FTB conducted this audit, including but not limited to those parts of the audit which intruded into the state of Nevada." Tr. 70-72 (Nov. 9, 1999, discovery hearing) (reprinted in FTB Mandamus Pet. 21). *See also id.* at 72-74 (FTB Mandamus Pet. 22). Any contention to the contrary is put to rest by the commissioner's acknowledgment that "there were only some few certain acts done in Nevada" by the FTB, but these were "only a part of the process of collecting the

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[3] It bears emphasis that Hyatt filed his collateral attack in the Nevada courts *after* he invoked the administrative remedies provided by California law for challenging the FTB's Notices of Proposed Assessment. *See* Pet. 3. Hyatt's California protest is still pending and may afford him complete relief from the proposed assessments and civil fraud penalties that he is collaterally attacking in his Nevada suit. *See id.* at 3, 10.

tax from Mr. Hyatt, *and the process is what is under attack here*." *Id.* at 72-74 (FTB Mandamus Pet. 22) (emphasis added).

B. Taxation Is A Core Sovereign Function

No function of government is more essential to sovereignty than the administration and collection of taxes. *See Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 561 (1830). "[T]axes are the lifeblood of government, and their prompt and certain availability an imperious need." *Bull v. United States*, 295 U.S. 247, 259 (1935). As the Court recognized more than 130 years ago, "[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871); *see also National Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995) (quoting same). Illegitimate and abusive interference with a State's enforcement of its tax laws threatens the very foundation of state government.

More recently, the Court has explained that "'[t]he procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules.'" *Fair Assessment In Real Estate Ass'n v. McNary*, 454 U.S. 100, 108 n.6 (1981) (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part)). In *Fair Assessment*, the Court held that taxpayers could not bring a collateral attack under section 1983 seeking compensatory and punitive damages from various state and local government tax officials for their allegedly unconstitutional property assessment. *See* 454 U.S. at

105-07. The Court instead directed the taxpayers to "seek protection of their federal rights by state remedies." *Id.* at 116.[4]

The Court has long prescribed a policy of federal court non-interference with state tax administration, which applies regardless of the nature of the relief sought. *See, e.g., Fair Assessment*, 454 U.S. at 116 (money damages); *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982) (declaratory relief); *Matthews v. Rodgers*, 284 U.S. 521, 529-30 (1932) (injunctive relief); *see also* 28 U.S.C. § 1341 (Tax Injunction Act). To be sure, these holdings relied on principles of comity, which between the federal and state sovereigns are not constitutionally imposed but derive from the Court's longstanding and "'"scrupulous regard for the rightful independence of state governments."'" *Fair Assessment*, 454 U.S. at 111 (quoting *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943) (quoting *Matthews*,

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[4] The prohibition against collateral attacks on state tax assessments is of longstanding vintage. *See, e.g., Stanley v. Supervisors of Albany*, 121 U.S. 535, 549-50 (1887). A corollary is the requirement that a taxpayer exhaust administrative remedies before bringing a judicial challenge to the tax. *See, e.g., First Nat'l Bank v. Board of Commissioners*, 264 U.S. 450, 455 (1924) (noting "the requirement, broadly recognized, that administrative remedies must be exhausted as a necessary prerequisite to a judicial challenge of the tax"). While common law causes of action such as fraud were once used to challenge tax assessments, the emergence of statutory remedies has supplanted these claims. *Cf.* Jerome R. Hellerstein & Walter Hellerstein, *State And Local Taxation* 987-88 (6th ed. 1997) ("Where statutory procedures exist for obtaining administrative review of the action of a taxing authority, courts typically hold that remedy to be exclusive[.]"). Moreover, the common law cause of action for fraud was used to obtain equitable relief for certain improper types of tax assessments, not for obtaining compensatory and punitive damages from the taxing authority. *See* Thomas M. Cooley, *A Treatise On The Law Of Taxation* 539 (1876).

284 U.S. at 525)).[5] That recognition, however, itself demonstrates that this case is what *Nevada v. Hall* called a "substantial threat to our constitutional system of cooperative federalism." 440 U.S. at 424 n.24.

Tort suits for punitive damages against a taxing authority would manifestly interfere with California's "capacity to fulfill its own sovereign responsibilities." *Id.* If the courts of the national sovereign must yield to state tax procedures even when federal constitutional rights—which are the supreme law of the land, U.S. Const. art. VI, cl. 2—are implicated, then surely a State cannot exercise jurisdiction over tort claims brought to collaterally attack another State's tax proceeding.[6]

Indeed, the Nevada Supreme Court's holding is all the more remarkable in light of its own previous ruling concerning Nevada's administrative remedies for taxpayers: "if a statutory procedure exists either for recovery of taxes collected erroneously or for disputing an excessive assessment, *that procedure must be followed*." *County of Washoe, Nevada Tax Comm'n, et al., v. Golden Road Motor Inn, Inc.*, 777 P.2d 358, 359 (Nev. 1989) (per curiam) (quoting *Lovelace Center for Health Sciences v. Beach*, 606 P.2d 203, 206 (N.M. Ct. App. 1980)). The Nevada Supreme Court's failure to follow this holding suggests that it has one rule for the Nevada Tax Commission, and another for other States' taxing authorities.

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[5] *See also Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435-37 (1982) (barring federal court interference with state administrative proceedings); *Younger v. Harris*, 401 U.S. 37, 54 (1971) (barring federal court interference with state criminal proceedings).

[6] Indeed, for years courts refused to enforce the tax laws of other sovereigns, deeming them to be penal. *See, e.g., Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888); Robert A. Leflar, *Extrastate Enforcement Of Penal And Governmental Claims*, 46 Harv. L. Rev. 193, 215 n.63 (1932) (collecting cases).

Under California law, Hyatt has adequate and complete remedies for contesting the FTB's proposed assessments including two levels of administrative review and the right to judicial review without having to first pay the final assessment. *See* discussion *supra*, at 2. California also provides a remedy to a taxpayer "aggrieved" if a Board employee "recklessly disregards board published procedures." Cal. Rev. & Tax Code § 21021(a).[7] Thus, there is no legitimate reason for the Nevada courts to exercise jurisdiction over respondent's suit. And as explained below, while Nevada is a sovereign co-equal in status to California, its courts' exercise of jurisdiction over respondent's suit is not within their discretion. To the contrary, structural principals of the Constitution preclude Nevada's exercise of jurisdiction in this case.

C. The Structure Of The Constitution Prohibits A State's Exercise of Jurisdiction Over A Citizen's Challenge To Another State's Tax Proceeding

In *Nevada v. Hall*, the Court upheld California's exercise of jurisdiction over a tort suit brought under California law against Nevada for injuries resulting from an auto accident involving a Nevada state employee while travelling in California. The Court held that the commerce, extradition, and privileges and immunities clauses "do not imply that any one State's immunity from suit in the courts of another State is anything other than a matter of comity." 440 U.S. at 425. The Court accordingly ruled that the Full Faith and Credit Clause did not require California's courts to apply a Nevada statute limiting to $ 25,000 any tort award against that State and affirmed a damages award of $ 1,150,000. *See id.* at 413, 427.

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[7] The FTB's procedures are accessible through its website. *See http://www.ftb.ca.gov/.*

It is true enough that nothing in the Constitution indicates why one State's policy of limiting monetary recovery should defeat another State's policy of providing full compensation for auto accident injuries. *See id.* at 426. There are, however, constitutional principles that demonstrate that this case falls within the class denominated in *Hall* as a "substantial threat to our constitutional system of cooperative federalism." *Id.* at 424 n. 24.

The first of these is the background principle, found in several lines of authority, which commands the various sovereigns in the federal system to avoid unwarranted interference with the governmental operations of other sovereigns. *See, e.g., Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523-24 (1926); *Ambrosini v. United States*, 187 U.S. 1, 7 (1902); *cf. Keely v. Sanders*, 99 U.S. 441, 443 (1878); *Ableman v. Booth*, 62 U.S. 506, 516 (1858). For example, in *Ambrosini*, the Court observed that the intergovernmental tax immunity "rests on the law of self-preservation, for any government whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government exists only at the mercy of the latter." 187 U.S. at 7 (citing *The Collector v. Day*, 78 U.S. (11 Wall.) 113 (1870)).

In *Metcalf & Eddy*, the Court explained that "each government in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other." 269 U.S. at 523 (citations omitted). The Court further stated that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers." *Id. Cf. Keely*, 99 U.S. at 443 ("no State court could, by injunction or otherwise, prevent Federal officers from collecting Federal taxes. The government of the United States, within its sphere, is independent of State action; and certainly it would be a strange thing if a State court by its action could relieve property [subject] to Federal taxation

from liability to pay the taxes when they are due."); *Ableman*, 62 U.S. at 515-16 ("no State can authorize one of its judges or courts to exercise judicial power . . . within the jurisdiction of another and independent Government").

If these background principles prohibit the federal and state sovereigns from undue interference with the governmental operations of the other, then surely they must guide the relationship between co-sovereign States as well. Few suits involve a greater interference with a State's administration of its sovereign functions than a collateral attack on its tax proceeding, especially where, as here, that attack summons the taxing State to answer in another State's courts and seeks punitive damages as well. Indeed, allowing taxpayers to subvert the remedial scheme of the taxing State and bring punitive damages claims against it in another State's courts would clearly have a chilling effect on a taxing State's attempt to collect entirely legitimate tax obligations. The extensive and highly burdensome discovery allowed here, *see* discussion *supra* at 6-8, which, in the words of the discovery commissioner's report, subjects "the entire audit and assessment process performed by the FTB" to discovery, *see* FTB Mandamus Pet. 20 (quoting Discovery Commissioner's Report and Recommendation, at 3), further demonstrates that respondent's lawsuit is a novel, unwarranted and constitutionally impermissible intrusion on California's sovereignty.

The second principle is found in the Court's cases interpreting the Extradition Clause, which is the Constitution's other provision expressly mandating interstate comity on a government to government basis. "The purpose of the Clause was to preclude any state from becoming a sanctuary for fugitives from justice of another state and thus 'balkanize' the administration of criminal justice among the several states." *Michigan v. Doran*, 439 U.S. 282, 287 (1978). The Clause recognizes that interference with another State's efforts to

bring a person charged with a crime to justice "would create a serious impediment to national unity." *Puerto Rico v. Branstad*, 483 U.S. 219, 227 (1987).[8]

The Court's cases interpreting the Clause have repeatedly rejected fugitives' attempts to collaterally attack the charging State's criminal proceedings. The Court has invariably done so, whether the attack was brought in state court, federal court or in a state executive branch proceeding. *See Branstad*, 483 U.S. at 230; *Doran*, 439 U.S. at 290; *Sweeney v. Woodall*, 344 U.S. 86, 90 (1952) (per curiam); *Marbles v. Creecy*, 215 U.S. 63 (1909); *Appleyard v. Massachusetts*, 203 U.S. 222 (1906). It has applied this principle to challenges alleging that the charge was without legal merit and an abuse of the criminal process, *see California v. Superior Court*, 482 U.S. at 412; that the charge was barred by the charging State's statute of limitations, *see Biddinger v. Commissioner of Police*, 245 U.S. 128, 135 (1917); that the fugitive could not receive a fair trial in the courts of the charging State, *see Branstad*, 483 U.S. at 222; and that the charging State subjected the fugitive to unconstitutional conditions of confinement, *see Sweeney*, 344 U.S. at 88-90.

For example, in *Sweeney* the Court rejected an escaped fugitive's attempt to challenge the constitutionality of his imprisonment in the charging State. *See id.* The Court reasoned that "[t]he scheme of interstate rendition . . . do[es] not

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[8] As the Court long ago explained:

> "[T]he statesmen who framed the Constitution were fully sensible, that from the complex character of the Government, it must fail unless the States mutually supported each other and the General Government; and that nothing would be more likely to disturb its peace, and end in discord, than permitting an offender against the laws of a State, by passing over a mathematical line which divides it from another, to defy its process . . . ."

California v. Superior Court of California, 482 U.S. 400, 406 (1987) (quoting *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 100 (1861)).

contemplate an appearance by [the charging State] in respondent's asylum to defend against claimed abuses of its prison system. Considerations fundamental to our federal system require that the prisoner test the claimed unconstitutionality of his treatment by [the charging State] in the courts of that State." *Id.* at 90 (footnote omitted). Concurring in the judgment, Justice Frankfurter explained that "due regard for the relation of the States, one to another, in our federal system . . . requires that claims even as serious as those here urged first be raised in the courts of the demanding State." *Id.* at 90-91.

While *Sweeney* involved a federal habeas corpus proceeding, the Court in *Michigan v. Doran* rejected a state court challenge to an extradition request. *See* 439 U.S. at 290. There the Michigan Supreme Court had essentially held that "the courts of an asylum state may review the action of the governor and in that process re-examine the factual basis for the finding of probable cause which accompanies the requisition from the demanding state." *Id.* at 286. This Court reversed, holding that "when a neutral judicial officer of the demanding state has determined that probable cause exists, the courts of the asylum state are without power to review that determination." *Id.* at 290.

The Court reasoned that the Extradition Clause, "its companion clause in § 1 [the Full Faith and Credit Clause], and established principles of comity merge to support this conclusion. To allow plenary review in the asylum state of issues that can be fully litigated in the charging state would defeat the plain purposes of " the Extradition Clause. *Id.* (citations omitted). *See also Branstad*, 483 U.S. at 229-30 (rejecting governor's assertion of discretion to refuse extradition request on grounds that fugitive would not receive a fair trial in charging jurisdiction).

As these cases recognize, the preservation of interstate harmony is best achieved by mandating jurisdictional limi-

tations which prohibit the use of the asylum State's judicial process to interfere with the charging State's proceeding. The respect which the States owe each other as co-sovereigns in the federal system precludes a State from questioning the integrity and fairness of another State's administrative and judicial processes.

Preventing tax evasion by those who cross state lines is as important to interstate harmony as ensuring that fugitives are returned for trial or incarceration. Furthermore, a State's exercise of jurisdiction over a lawsuit such as respondent's involves a far greater interference with another State's sovereignty than is typically implicated in an extradition matter. In extradition, the charging State is not hauled into another State's courts without its consent, it is not subjected to wide ranging and potentially abusive discovery, and it is not threatened with the possibility of an award of punitive damages. Indeed, if California had criminally charged respondent with tax fraud (instead of charging him civilly), there would be little doubt that this Court's precedents would prevent him from bringing a tort suit in Nevada challenging the process that led to the charge. *See* discussion *supra* at 20-21.

That the framers of the Constitution did not expressly contemplate the possibility of taxpayers crossing state lines and using the courts of another State to challenge tax proceedings brought in their former State of residence does not render the structural principles which guide the application of the Extradition Clause inapplicable in this context. The framers can hardly be faulted for failing to anticipate the novel intrusion on another State's sovereignty which respondent's suit involves. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). If they had, they undoubtedly would have recognized that such suits would balkanize tax administration and "create a serious impediment to national unity." *Branstad*, 483 U.S. at 227.

* * *

Throughout this country, millions of citizens cross state lines to work, thereby incurring tax obligations to the State where they are employed. Many citizens own property in, and owe property taxes to, States other than that of their primary residence. And, of course, large numbers of citizens relocate each year from one State to another.

Obviously, whenever a state taxing authority has reason to believe that a citizen of another State has improperly failed to pay taxes due, by necessity its investigation will require some contact with the taxpayer's State of residence. That a taxing authority engages in such contacts does not remotely justify the courts of the taxpayer's State of residence entertaining a collateral attack on the taxing State's processes. Indeed, affirmance of the Nevada Supreme Court's holding would encourage tax evasion as state tax administrators will be wary of pursuing cases if their agencies can be subjected to tort suits for punitive damages. Moreover, as this case—with its 315 hours of depositions, not to mention the time taken to prepare for them; its 329 document requests of the FTB, and countless motions—demonstrates, the costs of defending such actions will frequently make them too costly to pursue. While tax evaders might well prefer that result, the Constitution denies Nevada's courts the power to frustrate a co-sovereign's enforcement of its tax laws.

CONCLUSION

The judgment of the Supreme Court of Nevada should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD
OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT AND EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Nevada

Brief *Amicus Curiae* of Multistate Tax Commission in Support of Petitioner

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BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICUS CURIAE*

The Multistate Tax Commission is the administrative agency of the MULTISTATE TAX COMPACT. *See* RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 657 (2001). Twenty-one States have legislatively established full membership in the COMPACT. In addition, five States are sovereignty members and sixteen States are associate members.[2] The Court upheld the validity of the COMPACT in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978), including its authority to conduct multistate audits outside the territorial jurisdiction of its member States on their behalf.[3]

The genesis of the Commission was the threat that Congress would limit States' sovereignty to

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[1]No counsel for any party authored this brief in whole or in part. Only *Amicus* Multistate Tax Commission and its members States through the payment of their membership fees made any monetary contribution to the preparation or submission of this brief. Finally, this brief is filed pursuant to the consent of the parties.

[2] The COMPACT parties are Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. The Sovereignty members are Florida, Kentucky, Louisiana, New Jersey and Wyoming. The Associate members are Arizona, Connecticut, Georgia, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, West Virginia and Wisconsin.

[3] Congress has recognized the Commission's role in simplifying state taxation of interstate commerce. Mobile Telecommunications Sourcing Act, Pub. L. No. 106-252, 114 STAT. 626, 628-629 (2000), codified at 4 U.S.C. §§ 119(a)(2)(C) and 120(b)(1).

impose tax on multistate businesses.[4] To forestall that threat States joined into the Multistate Tax Compact to simplify and make more uniform their tax laws so as not to unduly burden interstate commerce. The prime motivation was to preserve to States the sovereignty—a cooperative sovereignty—that underlies our "cooperative federalism."[5] The Court's recent federalism jurisprudence reflects that same core value of the "dignity" of state sovereignty.

The Commission's work inevitably must balance the desirability of uniformity with the right of each State to decide its own tax policy. The trump card in the Multistate Tax Compact among coequal States is always a State's sovereignty.[6] Cooperative federalism requires the same primacy of a State's sovereignty when state statutes conflict and the Court is called on to fulfill its constitutional obligation under the Full Faith and Credit Clause to define the choice of law.

SUMMARY OF ARGUMENT

The Full Faith and Credit Clause transformed conflict-of-laws principles from a matter of comity into a constitutional mandate. The Clause requires that forum States give full faith and credit to the judgments *and* statutes of other States. Forum States routinely do so for judgments, but rarely for statutes. The Court has permitted a fo-

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[4] *See* Pub. L. No. 86-272, 73 Stat. 555. Title II provided for congressional studies of state taxation of interstate commerce.

[5] *Nevada v. Hall*, 440 U.S. 410, 424 n.24 (1979).

[6] Uncoordinated exercise of state sovereignty can produce state tax systems of sufficient diversity that they unduly burden interstate commerce, prompting *federal* commerce clause limitation on the authority of States to impose tax. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

rum State with sufficient due process contacts virtually unfettered discretion in choice-of-law decisions.

It is unreasonable, however, to interpret the Clause to relieve forum States of *all* obligation to give faith and credit to any statute of other States. That would erase the words "public Acts" from the Constitution. This case presents the one clear instance that requires controlling credit be to given statutes of another State. *Alden v. Maine*, 527 U.S. 706 (1999), affirmed States' enduring sovereign immunity. Under the same analysis, a State's immunity likewise endures in the courts of sister States. Thus, statutes setting forth a State's sovereign immunity are *always* more important than other interests of the forum State. Cooperative federalism compels this respect for the primary sovereignty interests of sister States over a forum State's other legitimate policy interests.

Nevada v. Hall, 440 U.S. 410 (1979), is inconsistent with any meaningful application of the Full Faith and Credit Clause in accordance with this Court's current sovereign immunity jurisprudence and should be overruled.

ARGUMENT

THE FULL FAITH AND CREDIT CLAUSE PRESERVES TO THE STATES THE IMMUNITY THEY ENJOYED IN THE COURTS OF OTHER STATES UPON ENTERING THE UNION.

At issue here is whether California and its "ministers" retain sovereign immunity from private lawsuits when they travel into sister States. Is California's statutory sovereign immunity—sufficient to withstand federal abrogation under

Alden v. Maine—also sufficient to withstand abrogation by a sister State acting as forum for a private suit? In that choice-of-law decision lies the irreducible nub of any effective implementation of the Full Faith and Credit Clause to the "public Acts" of a sister State.

A. States Retain Immunity from Private Suit.

This Court's recent opinions revitalizing its federalism jurisprudence afford prolific and finely honed articulations of the sources and extent of state sovereign immunity. What began as a gloss of the Eleventh Amendment has become a much more nuanced explication of the historical and enduring immunity of sovereign States as distilled in the "plan of convention."

Beginning with *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court has recognized that the extent of State sovereign immunity is not limited to the explicit terms of the Eleventh Amendment.

> Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

Alden, 527 U.S. at 713. The Court concluded in *Alden* that States retain sovereign immunity from private suits in their own courts, even suits authorized by Congress. At issue here is whether that immunity holds in the courts of a sister State, even from suits authorized by that State.

The Court's sovereign immunity analysis in *Alden* instructs us first to look to the degree of immunity that the States enjoyed in courts of foreign States before giving up their independence to become part of the union and then to whether that immunity was altered by the plan of convention or by subsequent constitutional amendment.

B. Prior to the Plan of Convention, States and their Ministers Enjoyed Immunity from Private Suit in Courts of Foreign States as a Matter of Comity.

At the time of the Constitution, sovereign States unquestionably enjoyed immunity for their ministers in the courts of foreign States.[7] In *Schooner Exchange v. McFaddon*, 7 Cranch (11 U.S.) 116 (1812), the Court recognized that sovereign States had *territorial* jurisdiction over foreign sovereigns and their ministers, but mutually waived that jurisdiction in furtherance of their mutual interest and intercourse.

> This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to wave [sic] the exercise of

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[7] *See* Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 Nw. U. L. Rev. 819, 821 (1999) ("In 1789, the word 'State' denoted an independent country that possessed complete or a significant degree of sovereignty.").

> a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

Id. at 137; *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) ("For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country").

Specifically with regard to ministers representing a Sovereign in a foreign State, the Court meticulously delineated the reasons for their immunity.

> The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission.

Schooner Exchange, 11 U.S. at 138-139.

California has similar concerns for "allegiance" and "competence" from its tax auditors whose activities are at issue here. While tax auditors may not be the "ministers" Chief Justice Marshall was envisioning in *Schooner Exchange*, they are specifically included under the umbrella of California's statutory sovereign immunity. California Government Code § 860.2.

How, then, did the plan of convention change this historic immunity States enjoyed in the courts of foreign States?

C. The Full Faith and Credit Clause Transformed the Respect that a Forum State Must Show the Sovereignty Interests of Other States from a Matter of Comity into a Constitutional Mandate.

A specific provision of the Constitution speaks to whether a forum State must honor the sovereignty interests of other States. The Full Faith and Credit Clause[8] altered the basis under which forum States had waived their absolute *territorial* jurisdiction over the sovereignty interests of other States, requiring respect both for their "public Acts" and "judicial proceedings." The Clause set in constitutional stone their mutual commitment to treat each other as coequals in a cooperative federal system. That mutual commitment transformed the obligation to give full faith and credit from a matter of comity into a constitutional imperative.

Justice Scalia emphasized that with the Full Faith and Credit Clause a constitutional mandate had replaced the comity formerly granted under international practice:

> JUSTICE BRENNAN's concurrence, post, at 740, misunderstands the famous statement from Milwaukee County v. M. E. White Co., 296 U.S. 268, 276-277 (1935), that "[t]he very purpose of the full faith and credit clause was to alter the status of the several states as independ-

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[8] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Art IV, § 1.

> ent foreign sovereignties." This statement is true, as the context of the statement in Milwaukee County makes clear, not because the Clause itself radically changed the principles of conflicts law but because *it made conflicts principles enforceable as a matter of constitutional command rather than leaving enforcement to the vagaries of the forum's view of comity.* See Estin v. Estin, 344 U.S. 541, 546 (1948) (the Full Faith and Credit Clause "substituted a command for the earlier principles of comity and *thus* basically altered the status of the States as independent sovereigns") (emphasis added).

Sun Oil Co. v. Wortman, 486 U.S. 717, 723-724 n.1 (1988) (first emphasis added).

In applying the Clause, however, the Court has accorded judgments and statutes markedly different degrees of faith and credit. "Regarding judgments, however, the full faith and credit obligation is exacting." *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232-33 (1998). Statutes have been treated with substantially less deference. *Id.* Although the Clause expressly mandates *full* faith and credit, the Court has become increasingly less inclined to require a forum State to give *any* appreciable faith or credit to the statutes of sister States.[9] *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Carroll v. Lanza*, 349 US. 408

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[9] *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 296 (1992) ("The most important word in the Clause is 'full.' A state does not owe some credit, partial credit, or credit where it would be wholly unreasonable to deny credit, which seems to be the Supreme Court's current interpretation.").

(1955); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935). The Court initially required forum States to credit other States' laws based on territorialist choice-of-law principles.[10] It then moved to a balancing of interests test[11] which it subsequently abandoned[12] in favor of the current rule that allows the forum State the presumptive right to apply its own law as long as it had sufficient contacts with the case. *Allstate*, 449 U.S. at 313.

The only decision in many years in which the Court has required deference to another State's statutes turned entirely on the lack of significant *due process* connection between the forum State and the litigation. *Phillips Petroleum Co. v. Shutts*, 474 U.S. 797, 821-22 (1985] (Kansas lacked sufficient connection to nonresident class members litigating interest payments on out-of-state properties.) The Court described the standard thusly:

> [T]he Due Process Clause and the Full Faith and Credit Clause provided modest restrictions on the application of forum law. These restrictions required "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts,

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[10] *See Bradford Electric Light & Power Co. v. Clapper*, 286 U.S. 145 (1932).

[11] *Alaska Packers* 294 U.S. at 547 ("the conflict is to be resolved . . . by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.").

[12] *Allstate*, 449 U.S. at 308 n.10 ("the Court has since abandoned the weighing-of-interests requirement.").

> creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."

Phillips Petroleum, 747 U.S. at 818 (quoting from *Allstate*, 449 U.S. at 312-313). These "modest restrictions" frame exclusively a due process test based entirely on having significant contacts to ensure that the choice of law of the forum State is not fundamentally unfair. This formulation gives no guidance in a real conflict of laws situation where both States have substantial contact and some choice of law must be made.[13]

Justice Stevens has described the clear conceptual distinction between choice-of-law considerations under the Due Process Clause and those under the Full Faith and Credit Clause.[14] The Due Process Clause asks whether the *forum* State has sufficient contacts such that the litigants have a justifiable expectation that the forum will fairly impose its own law.[15] The Full Faith and Credit

[13] James R. Peilemeier, *Why We Should Worry About Full Faith and Credit to Laws*, 60 S. Cal. L. Rev. 1299, 1323 (1987) ("no independent content has been given to the full faith and credit prong.").

[14] *Phillips Petroleum*, 474 U.S. at 824 (concurring and dissenting opinion) ("the potential impact of the Kansas choice on the interests of other sovereign States and the fairness of its decision to the litigants should be separately considered."); *Allstate*, 449 U.S. at 325 (concurring opinion).

[15] Contacts, justifiable expectations and fairness are archetypal due process concerns. "It is nevertheless possible for a State's choice of law to violate the Constitution because it is so 'totally arbitrary or . . . fundamentally unfair' to a litigant that it violates the Due Process Clause. [Citation omitted.] If the forum court has no connection to the lawsuit other than its jurisdiction over the parties, a decision to apply the forum State's law might so 'frustrat[e] the justifiable expectations of the parties' as to be unconstitutional." *Phillips Petroleum*, 474 U.S. at 837 (Stevens, J. concurring) (citing *Allstate*, 449 U.S. at 326, 327).

Clause, on the other hand, asks when the *other* State's sovereignty interests outweigh the forum State's interest, thus requiring the forum State to give controlling credit to the statutes of the sister State.[16] The Court's current jurisprudence asks only the first question.

By giving "minimal scrutiny"[17] to a forum's choice of its own law when two States have conflicting laws and both have sufficient contacts, the Court appears to have abjured any role as a constitutional choice-of-law arbiter. Perhaps Dean Prosser's "dismal swamp"[18] that has long mired choice-of-law scholars has also perplexed the Court with irreconcilable theories. Without a definitive choice-of-law doctrine, the Court has generally allowed the forum State to choose.

Some scholars lament what they perceive as the Court's retreat from an active choice-of-law role, concluding it demonstrates an abandonment of the Full Faith and Credit Clause. As Professor Laycock tersely observes:

> To simultaneously apply the conflicting law of two states is impossible; to require each state to apply the law of the

[16] "The [full faith and credit] inquiry implicates the federal interest in ensuring that Minnesota respect the sovereignty of the State of Wisconsin." *Allstate*, 449 U.S. at 320 (concurring opinion).

[17] Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. Chi. L. Rev. 440 (1982).

[18] William L. Prosser, *Interstate Publications*, 51 MICH. L. REV. 959, 971 (1953) ("The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.").

> other is absurd; and to let each state apply its own law repeals the Clause.[19]

Laycock proposes the need for a comprehensive federal choice-of-law jurisprudence, acknowledging that the details would have to be worked out over time by the courts.[20]

Others argue that the use of the forum State law serves important policy interests, protecting tort plaintiffs and contract creditors.[21] Given the lack of any other clear answer and the burden that developing one would pose for this Court, they support allowing free reign to the forum.

D. The Full Faith and Credit Clause Requires that Forum States Respect Statutes of Sister States Defining Their Immunity.

Your *Amicus* does not pretend to have a way out of the dismal swamp. The instant case, however, does provide an island of fixed high ground.

Permitting the forum State to choose to give *no* faith or credit to any statute of other States cannot be a reasonable interpretation of the constitutional provision. The Clause mandates a single, explicit directive—to give "full faith and credit" to judgments *and* statutes. How can the "judicial

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[19] Laycock, *supra* note 9, at 297.

[20] Laycock, *supra* note 9, at 310 ("Congress or the federal courts should specify choice-of-law rules and that state courts should follow those rules, to the end that the same law will be applied no matter where a case is litigated."). *See also* Scott Fruehwald, *Constitutional Constraints on State Choice of Law*, 24 U. DAYTON L. REV. 39, 74 (1998) ("choice of law should be unconstitutional if a court chooses a state's law when another state has a *significantly* closer connection to the controversy.").

[21] Weinberg, *Minimal Scrutiny* at 462-70; Louise Weinberg, *Against Comity*, 80 Geo. L.J. 53, 66 ("forum law is indeed generally 'better.'").

Proceedings" portion include virtually all judgments while the "public Acts" portion not refer to a single statute? That would leave enforcement of conflicts principles *entirely* "to the vagaries of the forum's view of comity" rather than to a "constitutional command"—the very opposite of Justice Scalia's observation above. At least some statute of another State must deserve a constitutional nod in a choice-of-law decision. This case concerns that statute.

If any "public Acts" of a State are entitled to be given full faith and credit in the courts of a sister State, it must surely be those Acts that limn the degree of sovereign immunity to which the State and its agencies are entitled. Justice Stevens noted the centrality of avoiding infringement of other States' sovereignty under the Full Faith and Credit Clause.

> The Full Faith and Credit Clause implements this design [of our federalism] by directing that a State, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringement upon their sovereignty.

Allstate, 449 U.S. at 322 (concurring opinion).

States can have no stronger "legitimate interest" than their sovereignty. States can suffer no greater "infringement upon their sovereignty" than denial of their explicit statutory sovereign immunity from suit. A State's sovereign immunity, by definition, trumps every private litigant's right to compensation. That is the very essence of what sovereign immunity means.

A State's sovereign immunity transcends as well any other forum State's "own legitimate public policy" to allow greater victim compensation by more narrowly limiting its own sovereign immunity. Nevada can surely waive its own sovereign immunity to allow greater recovery by private litigants from the Nevada fisc. But Nevada cannot waive California's sovereign immunity. Nevada's courts cannot infringe on California's sovereign immunity by allowing any greater recovery from California's fisc than California has chosen to permit. Any other rule would allow one State to limit the most central aspect of the sovereignty of another State. California's statutes setting forth the extent of its sovereign immunity define the very core of what being sovereign means.

Unlike other choice-of-law cases where various factors may be considered, here one factor—the sovereign immunity interests of California—is conclusive. Requiring full faith and credit for state sovereign immunity statutes provides a course by which to navigate between the contending academic theories. It gives concrete substance to the "public Acts" portion of the Clause without having to drain the entire swamp.

E. *Nevada v. Hall* is Inconsistent with Cooperative Federalism and the Most Minimal Enforcement of the Full Faith and Credit Clause.

And yet, the Court in *Nevada v. Hall* found no such full faith and credit requirement for the sovereign immunity statute of Nevada. In finding California's preference for its own policy sufficient there (as it would find Minnesota's preference sufficient in *Allstate*), the Court focused on assessing the forum's interests in compensating a personal

injury, as it has in many full faith and credit cases. But *Nevada v. Hall* was unlike other full faith and credit cases. Because the defendant was another State, its interest was not merely its own less generous policy on victim compensation. Nevada's interest was its very sovereignty itself as defined by its statutory sovereign immunity. Of course States have substantial interest in prescribing compensation rules for third parties in order to protect their citizenry. But such interests can never in our system of cooperative federalism outweigh another State's interest in its own sovereignty.

Nevada v. Hall was decided before the Court had fully developed the appreciation of the sources of state sovereign immunity evident in its current federalism jurisprudence. The Court in *Nevada v. Hall* did acknowledge that coming into the union States enjoyed sovereign immunity in the courts of foreign States. It aptly focused on whether the forum State is bound "by a federal rule of law implicit in the Constitution that requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418. But the Court strayed from its current federalism analysis when it assumed that the "question whether one State might be subject to suit in the courts of another state was apparently not a matter of concern when the new constitution was being drafted and ratified." *Id.* That assumption was based on the lack of specific constitutional provision expressly preserving the immunity and the lack of discussion of the issue in the ratification process. All of the cases and all of the debate, the Court noted, concerned States' immunity in *federal* courts. *Id.* at 419.

Alden held that this crucial assumption was not well founded. "We believe, however, that the founders' silence is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity." 527 U.S. at 741.[22] The Court further ruled in *Alden* that the States retained immunity from private suit even where Congress as the supreme sovereign authorized those suits. There is no basis for treating differently a State's immunity from private suit in the courts of sister States, also enjoyed prior to union. Otherwise the legislature of one State would have greater power to abrogate the sovereign immunity of a sister State than Congress does. The plan of convention can hardly have intended for California to be immune from suit by a Nevada resident in federal court, a neutral forum, and its own courts, but not immune in Nevada courts, where one would expect the greatest parochial bias against California. That is not cooperative federalism.

CONCLUSION

The Full Faith and Credit Clause converted the immunity that foreign States granted visiting sovereigns and their ministers from a matter of comity to a matter of constitutionally required respect

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[22] The Court's discussion in *Alden* of *Nevada v. Hall* focused on whether it provided any support for the argument that a State's immunity in its own courts from private suit was limited by the Constitution and could be abrogated by Congress. It did not subject *Nevada v. Hall* to the federalism analysis the Court was there undertaking. *See* Carlos Manuel Vázquez, *Sovereign Immunity, Due Process and the* Alden *Trilogy*, 109 YALE L.J. 1927, 1937 (2000), citing authorities relied upon in *Alden* that are seemingly inconsistent with the holding in *Nevada v. Hall*.

for the sovereignty of sister States under the cooperative federalism of the Constitution.

The historic durability of state sovereignty immunity explicated in this Court's recent federalism jurisprudence informs the content of the constitutionally mandated choice of law rules and gives force and meaning to the Full Faith and Credit Clause. What more paramount interest can a State have than its sovereignty? If the Full Faith and Credit Clause does not require at a minimum that a forum State give full faith and credit to those public Acts of a sister State that proclaim its sovereign immunity, the reference in the Clause to "public Acts" might as well be erased from the Constitution.

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FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT HYATT, *et al.*

Respondents.

On Writ of Certiorari to the
Supreme Court of the State of Nevada

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS GILBERT HYATT, ET AL.

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QUESTION PRESENTED

Does the Constitution's Full Faith and Credit Clause (Art. IV § 1) require a state to apply another state's substantive law, when the other state is pursuing a "core sovereign function," even when doing so contravenes the forum state's policies?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) respectfully submits this brief *amicus curiae* in support of Respondent.[1] Consent to file this brief was obtained from all parties, and has been lodged with the clerk of the Court.

PLF is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Coral Gables, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated in numerous cases concerning federalism, the scope of the Commerce Clause, and the constitutionality of various provisions of federal law. For example, PLF participated as *amicus curiae* before this Court in *United States v. Morrison*, 529 U.S. 598 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Printz v. United States*, 521 U.S. 898 (1997); and *United States v. Lopez*, 514 U.S. 549 (1995); and is appearing as *amicus curiae* before the Court this term in, *inter alia*, *Nevada v. Hibbs*, No. 01-1368, *cert. granted*, 122 S. Ct. 2618 (2002).

This case raises a significant and fundamental question of law about the extent to which the Constitution limits a state's

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

authority to set its own policies even if they differ from those of other states. PLF seeks to augment Respondents' arguments by further elucidating the original meaning of the Full Faith and Credit Clause of the Constitution (art. IV, § 1 (hereafter "the Clause")). Such an examination has importance beyond the facts of this case, since the Court is likely to be called upon to apply the Clause, in areas ranging from homosexual marriage to assisted suicide laws. PLF believes its public policy perspective and litigation experience dealing with the constitutional principles of federalism will provide this Court with a broader historical and policy viewpoint than that presented by the parties, and that this will aid the Court in resolving this case.

STATEMENT OF THE CASE

At the heart of this case is the question, whether a state can protect its citizens from intentional torts committed within its borders by agents of another state, where the tortfeasor state has statutorily immunized its agents from liability for their tortious conduct?

Petitioner, the California Franchise Tax Board ("California"), began an investigation to establish that Respondent Gilbert Hyatt's change of residence to Nevada was fraudulent, and therefore he owed California income tax. Mr. Hyatt alleges that, in the course of that investigation, California agents entered Nevada, and committed several intentional and negligent torts. For example, the agents questioned Mr. Hyatt's friends, neighbors, employees, customers of stores where he shopped, and even his trash collector, divulging personal details and false information about Mr. Hyatt. App. to Pet. for Cert. at 55-56. He further alleges that California officials threatened to reveal personal financial information about Mr. Hyatt if he did not agree to settle California's case, and informed Mr. Hyatt's business contacts that he was under investigation, which interfered with his software licensing business. *Id.* at 68.

California assessed Mr. Hyatt not only for the taxes they claimed he owed, but added a $9 million "fraud penalty" apparently in an attempt to induce him to settle. *Id.* at 60-61.

Mr. Hyatt sued California in Nevada state court, alleging a number of intentional torts and one negligent act. California argued that California law (Cal. Gov't Code § 860.2) provides its agents with absolute immunity from suit, and that Nevada courts were obligated, as a matter of full faith and credit, to apply this statutory immunity to bar Mr. Hyatt's suit. The Nevada Supreme Court, however, held that the Clause did not require Nevada courts to apply such immunity, and also that principles of interstate comity did not require Nevada courts to apply such immunity for intentional torts, since doing so would contravene Nevada state policy. However, over a dissent, the court below did apply the immunity for negligent torts under principles of comity. *Franchise Tax Bd. of Cal. v. Eighth Judicial Dist. Court of Nevada*, No. 35549, 2002 Nev. LEXIS 57 (Nev. April 4, 2002).

SUMMARY OF ARGUMENT

The Constitution does not require Nevada to apply California law within Nevada's borders. Nevada has a legitimate interest in preventing and prosecuting torts within its boundaries and, therefore has sufficient contact with the case under *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), to justify it in applying its own law. California agents went to Mr. Hyatt's Nevada home, went to stores where he shopped, interviewed Nevada residents about him, and allegedly committed a number of intentional and negligent torts in Nevada. The concerns brought forth by the dissenters in *Nevada v. Hall*, 440 U.S. 410 (1979), and which were addressed by footnote 24 of that opinion—namely, that one state ought not to be liable to suit in another state for actions within its own boundaries—are not raised here, since California agents were acting within Nevada's boundaries.

California asks this Court to adopt an "effects rule," under which Nevada would be required to apply California law when failing to do so would "interfere[] with [California]'s capacity to fulfill its own core sovereign responsibilities." Petitioner's Brief at 13. This "effects rule" is too vague, gives unwarranted power to federal courts, and is inconsistent with the original meaning of the Clause. Moreover, it would infringe on the sovereignty of the states and further confuse case law interpreting the Clause.

Although California argues that its proposed "effects rule" is consistent with the original meaning of the Clause, a review of the Clause's history shows precisely the opposite. The Framers of the Clause did not interpret it to require one state to apply the laws of other states, but only that state courts must admit other states' judgments and statutes as *prima facie* evidence—though not conclusive evidence—of the existence and validity of such judgments. This understanding of the Clause was applied under the Articles of Confederation (which contained a nearly identical clause). The Constitution modifies this only by giving Congress exclusive authority to determine the effect that states must give to other states' judgments and public acts. When, as here, Congress has failed to do so, states are free to determine on principles of comity what effect to give foreign judgments or statutes. This allows states to pursue their own policies even if they differ from those of other states and is therefore consistent with the Constitution's purpose of giving federal authority to Congress, without disparaging state sovereignty.

Respect for Nevada's sovereignty requires that it be free to decide when to apply another state's laws. California's interpretation of the Clause would undermine state sovereignty, encourage friction between the states, and lead to what this Court has called an "absurd" constitutional rule. *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935).

ARGUMENT

I

NEVADA HAS SUFFICIENT CONTACTS WITH THIS CASE THAT IT NEED NOT APPLY CALIFORNIA'S IMMUNITY STATUTE

A. Nevada Has Sufficient "Contacts" with This Case to Permit Its Use of Its Own Law

Modern Full Faith and Credit jurisprudence requires a state to apply the law from another jurisdiction only if the forum state has "insignificant contact with the parties and the occurrence or transaction," to justify applying its own laws. *Allstate*, 449 U.S. at 310.

Allstate therefore establishes a presumption in favor of allowing a forum state to apply its own law. In *Allstate*, although the decedent was a resident of Wisconsin, he was a member of Minnesota's workforce, commuted to work in Minnesota, *id.* at 313-14, and his insurance company was present and doing business in Minnesota, *id.* at 317. This was held to be a "significant aggregation of contacts" with Minnesota to allow Minnesota courts to apply Minnesota law.

Likewise, Nevada has sufficient contacts with the case at bar to justify it in applying its own law. Nevada has a legitimate, if not compelling, state interest in preventing intentional torts committed against its residents. In this case, Mr. Hyatt was a member of Nevada's workforce and actually resided in Nevada. California chose to send agents into Nevada to conduct its investigation. It therefore ought not to be surprised that the conduct of those agents is judged by Nevada law. *Cf. id.* at 317-18. Nor should it be able to use federal authority to enforce California laws within Nevada's boundaries. *Id.* at 308.

Mr. Hyatt alleges, inter alia, the tort of invasion of privacy. The right to be let alone is "'the right most valued by civilized men.'" *Hill v. Colorado*, 530 U.S. 703, 716 (2000) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). It is the province of state law to protect this right. *Id.* at 717 n.24 (citing *Katz v. United States*, 389 U.S. 347, 350-51 (1967)). Nevada's laws against sifting through a person's garbage, disclosing personal information to third parties despite promises not to do so, and similar outrageous practices, embody the legitimate state interest of protecting its residents. *International Paper Co. v. Ouellette*, 479 U.S. 481, 502 (1987) ("States have 'a significant interest in redressing injuries that actually occur within the State.' This traditional interest of the affected State . . . is protected by providing for application of the affected State's own tort laws in suits against the source State's [tortfeasors]." (Quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984).) *See also Carroll v. Lanza*, 349 U.S. 408, 413 (1955) ("The State where the tort occurs certainly has a concern in the problems following the wake of the injury. . . . A State that legislates concerning them is exercising traditional powers of sovereignty.").

B. Any Possible Exception in *Hall* Does Not Apply Here

Although California concedes that Nevada's contacts with the case would satisfy the *Allstate* requirements, *see* Pet. Br. for Pet. of Writ of Cert. at 6, California asks this Court to adopt a new standard, requiring a forum state to apply the laws of another state where doing so is necessary to protect the other state's pursuit of sovereign responsibilities. California bases its argument on a footnote of *Nevada v. Hall*, 440 U.S. at 424 n.24.

In *Hall*, a Nevada agent injured some California residents in a traffic accident in California. The Nevada employee was driving a car owned by Nevada and was on official business. The California residents sued for damages, but Nevada argued that a Nevada statute limited the amount of recoverable

damages to $25,000. California law recognized no such limitation, but Nevada argued that the Full Faith and Credit Clause required California to apply the limitation. This Court held that the Clause "does not require a State to apply another State's law in violation of its own legitimate public policy," *id.* at 422, and therefore California was not constitutionally required to apply the damages limitation. In footnote 24, this Court noted that the case "pose[d] no substantial threat to our constitutional system of cooperative federalism," and that a different analysis might apply where a case "interfere[d] with Nevada's capacity to fulfill its own sovereign responsibilities."

Footnote 24 was written to address the point raised by the dissenting opinion which was concerned with the majority's refusal to fix sovereign immunity on a constitutional basis. *See id.* at 427 (Blackmun, Rehnquist, JJ., Burger, C.J., dissenting); *id.* at 432 (Rehnquist, J., and Burger, C.J., dissenting). Justice Blackmun (joined by Justice Rehnquist and Chief Justice Burger) conceded that a state's sovereignty ends at the state line, *id.* at 428, but worried that, since the majority did not limit its decision to those grounds, "Nevada's amenability to suit in California is not conditioned on its agent's having committed a tortious act *in California*." *Id.* (emphasis added). This created a risk that "State A . . . [might] be sued by an individual in the courts of State B on any cause of action . . . " *id.* at 428-29, including cases arising within State A's boundaries. Justice Rehnquist and Chief Justice Burger echoed these concerns in their dissent. *See id.* at 443 ("The federal system . . . is built on notions of state parity.")

This review shows that the dissents were not concerned primarily with protecting one state's immunity for acts committed in another state. Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. Rev. 485, 584 (2001); William D. Torchiana, *Choice of Law and The Multistate Class: Forum Interests in Matters Distant*, 134 U. Pa. L. Rev. 913, 918 (1986). Instead, their concern, addressed by footnote

24 of the majority opinion, was that *Hall* might be interpreted as allowing courts of one state to hear a suit against a second state for actions occurring within the second state's own borders—a situation not presented in this case. This is why, in his concurring opinion in *Allstate*, Justice Stevens explained that the reservation in *Hall*'s footnote 24 was meant to apply when one state "unjustifiably infring[ed] upon the *legitimate* interests of another State." 449 U.S. at 323 (Stevens, J., concurring) (emphasis added). That a state might be sued without its consent for acts undertaken within its own jurisdiction gives rise to more extreme sovereignty considerations than are implicated in this case, where California was acting within Nevada's sovereign territory.

Biscoe v. Arlington County, 738 F.2d 1352 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985), supports this interpretation of *Hall*. In that case, Arlington County, Virginia, argued that the Clause required the District of Columbia to apply Virginia's statutory immunity for police officers. An officer had committed a negligent tort while pursuing a suspect in the District, and Arlington County argued that under *Hall*'s footnote 24, the District was required to apply Virginia law because the officers were engaged in the sovereign function of pursuing criminals. The court rejected this argument. Arlington's interests in law enforcement "weaken—and will yield to other interests—when it acts outside Virginia's borders." *Id.* at 1358. Thus the situation in *Biscoe* was "wholly different from one in which a Virginia county has acted *within its borders*, or those of the state, and is sued in the courts of a sister state." *Id.*

Footnote 24 of *Hall* was intended to protect a state's right to act within its *own* borders. Since the Arlington officers were acting outside of Virginia, any possible exception created by footnote 24 was inapplicable. Likewise here, California's agents were acting outside of the boundaries of California. Nevada's exercise of jurisdiction is therefore neither intrusive

nor unreasonable. The policy concerns which gave rise to footnote 24 are not implicated when one state is enforcing its tort law on those acting within its borders, even when defendants happen to be agents of another state. *See also Struebin v. State*, 322 N.W.2d 84, 86 (Iowa), *cert. denied*, 459 U.S. 1087 (1982).

II

THE FULL FAITH AND CREDIT CLAUSE WAS NOT WRITTEN TO REQUIRE ONE STATE TO APPLY THE LAWS OF ANOTHER STATE

"This Court has regularly relied on traditional and subsisting practice in determining the constitutionally permissible authority of courts." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 728 n.2 (1988). A review of the original meaning of the Full Faith and Credit Clause is therefore in order. But, contrary to California's superficial analysis, Pet. Br. at 20-24, the Clause was not written to mandate the application of one state's law in the courts of another state and does not support California's proposed "effects rule."

A. The Terms "Full Faith and Credit" Originally Referred to State Courts Admitting into Evidence Judgments or Statutes from Other State Courts

At the time of the American Revolution, the terms "faith" and "credit" had been used as terms of art in the law of evidence for over two centuries.[2] *See further* Ralph U. Whitten,

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[2] *See, e.g., Caudrey's Case*, 5 Co. Rep. 1a, 7a, 77 Eng. Rep. 1, 9 (K.E.L. 1595); *Bunting v. Lepingwell*, 4 Co. Rep. 29a, 76 Eng. Rep. 950, 952 (K.B. 1585); *Walker v. Witter*, 1 Doug. 1, 99 Eng. Rep. 1, 4-6 (K.B. 1778); *Robinson v. Bland*, 1 Black. 256, 257, 96 Eng. Rep. 141 (K.B. 1760) ("Foreign decrees are received here, not as *res judicatae*, but as evidence of the custom and law of the country.") *See also* Noah Webster, *A Compendious Dictionary of the English Language* 71 (1806) ("Credit: to believe, admit, trust, set off, honor."

(continued...)

The Original Understanding of The Full Faith And Credit Clause and the Defense of Marriage Act, 32 Creighton L. Rev. 255, 265-66 (1998); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses* (Part I), 14 Creighton L. Rev. 499 (1981); Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 Mich. L. Rev. 33, 44 (1957).

Specifically, the terms "faith" and "credit" were used in cases involving the applicability of judgments from other jurisdictions. At common law, judgments from domestic courts were considered binding and valid and could not be attacked in subsequent proceedings brought in the same jurisdiction. Foreign judgments, by contrast, could be attacked. The important question, therefore, was whether, in an American colony's courts, judgments rendered in England, or in another colony, were "foreign" or "domestic." Prior to the American Revolution, the colonies adopted different answers to this question, which naturally led to complications for creditors. *See generally* 3 Joseph Story, *Commentaries on the Constitution* § 1307 (3d ed. 1858).

In 1777, to remedy this and similar problems, the Continental Congress formed a committee to amend the Articles of Confederation. Among the amendments they recommended was one which read,

> full faith and credit shall be given in each of the States to the Records, Acts, and Judicial Proceedings of the Courts and Magistrates of every other State, and that an Action of Debt may lie in the Court of Law in any State for the Recovery of a Debt due on Judgment of any Court in any other State . . . .

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[2] (...continued)
Id. at 112: "Faith: belief, fidelity, honesty, truth, promise.")

9 *Journals of the Continental Congress* 887 (Nov. 11, 1777). The Clause was adopted with some changes, *id.* at 895-96, finally reading simply, "Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State." Articles of Confederation, art. IV, § 3. This is nearly identical to the Clause as it appears today in Article IV of the Constitution.

California's interpretation is also inconsistent with the history of the Articles of Confederation. The Articles created an unstable and decentralized union, which the Federal Convention had to make "more perfect." *Yet the Clause was already part of the Articles.* If, as California argues, the Clause required state courts to apply the laws of other states, then the union created by the Articles would have been much stronger. But under the Articles, no such requirement was imposed, because that would have infringed on state sovereignty.

B. The Full Faith and Credit Clause in the Articles of Confederation Was Interpreted Only as an Evidentiary Requirement

The Full Faith and Credit Clause in the Articles of Confederation was never interpreted as requiring one state to apply the laws of other states. Decisions rendered under the Articles routinely explained that the Clause only required courts to admit out-of-state judgments as evidence—and not conclusive evidence—of their own existence and validity. For instance, in *James v. Allen*, 1 Dall. (1 U.S.) 188, 191-92 (Pa. 1786), the common pleas court of Philadelphia noted that the Clause did not mean that "every order of a foreign Court . . . or any local laws of that country . . . can have the effect of restraining us from proceeding according to our own laws here . . . . [O]therwise executions might issue in one State upon the judgments given in another . . . ." Instead, the Clause was

"chiefly intended to oblige each State to receive the records of another as full evidence of such Acts and judicial proceedings." *Id.*

Similarly, in *Phelps v. Holker*, 1 Dall. (1 U.S.) 261 (Pa. 1788), the Pennsylvania Supreme Court held that the Clause did not prevent Pennsylvania courts from inquiring into the validity of a judgment rendered in Massachusetts. Attorney Jared Ingersoll argued that the Clause was intended to "place the States upon a different footing with respect to each other, than with respect to foreign nations." Since the Clause was intended "to form a stronger cement" between the states, Ingersoll argued that Pennsylvania Courts were required to accept Massachusetts judgments as conclusive and binding. *Id.* But the Court rejected this argument: "The articles of Confederation must not be construed to work such evident mischief and injustice, as are contained in the doctrine, urged for the Plaintiff." *Id.* at 264 (Opinion of McKean, J.).

The court was more explicit in *Millar v. Hall*, 1 Dall. (1 U.S.) 229 (Pa. 1788). "[T]he laws of a particular country," wrote Justice McKean, "have in themselves no extra-territorial force, no coercive operation" *Id.* at 231. Under principles of comity, foreign judgments might "acquire an influence and obligation, and, in many instances, become conclusive throughout the world." *Id.* at 232. But these principles were based on a "mutual conviency policy, the consent of nations, and the general principles of justice," *Id.* at 232. The Full Faith and Credit Clause of the Articles of Confederation was not interpreted as *requiring* one state to apply the laws of another state in its own courts.

C. The 1787 Constitution Vested Congress Alone the Authority to Prescribe the Effect of a Sister State's Law in a Forum State

The Philadelphia Convention took up the Clause on August 29, 1787. The Committee of Detail had reported a clause with minor differences in wording from the Clause in the Articles of Confederation, and Delegate Hugh Williamson moved "to substitute . . . the words of the Articles of Confederation," since he "did not understand" the changes. 2 *Records of The Federal Convention* 447 (M. Farrand ed. 1911). Others explained that "[j]udgments in one State should be the ground of actions in other States, & that acts of the Legislatures should be included, for the sake of Acts of insolvency, &c." *Id.* James Madison suggested expanding the Clause "to provide for the *execution* of Judgments in other states," *id.* at 448, but Edmund Randolph immediately objected that "there was no instance of one nation executing judgments of the Courts of another nation," and Madison's proposal failed. *Id.* This exchange reveals that the framers saw the Clause as imposing nothing more than the comity principles of the Articles of Confederation (with the minor addition of "Acts of insolvency"). In other words, the Clause did not require one state to give binding effect to judgments or laws of other states; in fact the Convention explicitly rejected such a proposal.

When the Convention took up the provision again, on September 3, James Wilson recommended giving Congress authority to "*declare the effect*" that one state's judgments would have in other states, because otherwise, "the provision would amount to nothing more than what now takes place among all Independent Nations." *Id.* at 488. Thus Wilson saw the Clause, which at this point was identical to the Clause in the Articles of Confederation, as requiring nothing more than comity. He proposed going beyond comity by giving Congress exclusive power to declare the effect of such judgments or acts.

Only by giving Congress the power to "*declare the effect*," did the 1787 Clause rise above comity or the "mutual conveniency" required by the Articles.

This interpretation is also supported by the fact that Edmund Randolph objected to Wilson's motion, because Randolph believed that giving Congress authority to require a state to enforce the judgments or laws of other states "strengthen[ed] the general objection agst. the plan," by giving Congress "opportunities of usurping all the State powers." *Id.* at 488-89. Similarly, in the *Federalist*, Madison explained that only this new Congressional power to declare the effect decreased the states' authority to determine for themselves when to apply sister states' law. In other respects, the Clause was identical to the Articles of Confederation.

> The power of prescribing by general laws, the manner in which the public acts, records and judicial proceedings of each State shall be proved, and the effect they shall have in other States, is an evident and valuable improvement on the clause relating to this subject in the articles of Confederation. The meaning of the latter is extremely indeterminate, and can be of little importance under any interpretation which it will bear. The power here established [by adding Congressional authority to declare the *effect*] may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States . . . .

The Federalist No. 42, at 271 (James Madison) (C. Rossiter ed., 1961). If the Clause was "'of little importance . . .' it is highly unlikely that it could have imported conclusive evidentiary effect on the merits or incorporated jurisdictional or other conflict of laws rules." Whitten, 14 Creighton L. Rev. at 554.

Madison's language makes sense only if the Clause is understood as giving Congress the sole authority to prescribe

what effect that the laws of sister states will have. As Professor Whitten notes, "[i]t is implausible to suppose that [the Clause] would require the forum state to enforce a sister-state's law. . . . It is more plausibly read as a command that the sister-state's statute, perhaps authenticated as prescribed by Congress, be admitted as conclusive evidence of the law of the sister-state." *Id.* at 544.

Courts interpreting the Clause after ratification generally did not hold that it required states to give substantive effect to the statutes or judgments of other states. In *Banks v. Greenleaf*, 10 Va. 271 (1799), Justice Bushrod Washington explained:

> [T]he laws of every government have force within the limits of the government; and are obligatory upon all, who are within its bounds. . . . They have no effect, directly, with the people of any other government; but, by the courtesy of nations, to be inferred from their tacit consent, the laws, which are executed within the limits of any government, are permitted to operate every where, provided they do not produce injury to the rights of such other government, or its citizens.

Id. at 272. Justice Washington held that the Clause required Virginia courts to admit Maryland judgments as evidence, but Congress had sole power to determine the effect of such judgments, and had not done so. Therefore, Virginia courts were free to determine the effect of Maryland judgments on the basis of comity. Justice Washington declined to give *conclusive* effect, because the laws "of one state are as little obligatory upon another, as those of a foreign country; . . . [the people] cannot be said to owe allegiance to any state, in which they do not reside." *Id.* at 278. Likewise, here, Mr. Hyatt is not a California resident, and should not be subject to California law.

Justice Washington wrote in *Green v. Sarmiento*, 10 F. Cas. 1117, 1118-19 (C.C.D. Pa. 1810):

> [T]he change of the language of this section of the constitution, from the parallel section of the articles of confederation, affords a strong reason for the opinion, that the former was intended to give to the judgments of each state within the other states, a more extensive force and effect, than the rule of law, founded on mere comity, had allowed to foreign judgments. The fourth article of the confederation, goes no farther than to declare, that "full faith and credit shall be given in each state, to the records, acts, and judicial proceedings of the courts and magistrates of every other state;" whereas the constitution proceeds to add, that congress may declare what shall be the effect of such records, acts, and judicial proceedings.

But the Clause "remained unfulfilled, until congress should have made provision" declaring what shall be the effect. *Id.* at 1119. Thus, since Congress had not determined what effect sister states' laws should have in each others' courts, states were required to admit the existence of foreign judgments and statutes as *evidence*, but remained free to determine for themselves, on comity principles, when to *apply* outside law. *See further Hammon & Hattaway v. Smith*, 1 Brev. (3 S.C.L.) 110 (1802); *Bartlet v. Knight*, 1 Mass. 401, 410 (1805); *Taylor v. Bryden*, 8 Johns. 173 (N.Y. 1811); *Bissell v. Briggs*, 9 Mass. 462, 467 (1813); Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith And Credit*, 12 Mem. St. U. L. Rev. 1, 41-53 (1981). Only Kentucky held unequivocally that the Clause required states to give conclusive effect to other state judgments and statutes. *See id.* at 49.

As Judge Kent wrote in *Hitchcock v. Aicken*, 1 Cai. R. 460, 480 (N.Y. 1803), the Clause "distinguished between giving full faith and credit, and the giving effect to the records of another State, and until Congress shall have declared by law what that effect shall be, the records of different states are left precisely in the situation they were in under the articles of confederation."

Justice Washington then explained that the Full Faith and Credit Act of 1790, 1 Stat. 122 (1790), now codified at 28 U.S.C. § 1738, with minor revisions, did *not* prescribe the effect that statutes would have, because it declared only that forum states should give the "same faith and credit" to acts and judgments that were given by nonforum states. Judge Radcliff agreed that neither the Clause nor the act required one state to apply the law of other states:

> The full faith and credit, intended by the Constitution, cannot be interpreted to mean their legal effect, for otherwise the subsequent provision that Congress may prescribe the effect would be senseless and nugatory. The Constitution makes a plain distinction between "credit" and "effect;" . . . consistent with that principle of the common law which ascribes absolute verity to the records and judicial proceedings in our own courts. When a judgment or recovery in our own courts is pleaded, it is alleged as a fact, the record of which cannot be denied, and is conclusive of the fact . . . but its legal effect, or operations on the rights of the parties, is still to be considered, and frequently may form a distinct question. The provision . . . can extend no farther.

Aicken, 1 Cai. R. at 475-76 (opinion of Radcliff, J.). Thus, 28 U.S.C. § 1738 does not dispose of this case. As Chief Justice Marshall explained, that statute does not determine what effect

judgments or statutes shall have in other states. *Peck v. Williamson*, 19 F. Cas. 85 (C.C.D. N.C. 1813). The Clause itself provides no mandate, and the statute merely parrots the language of the Clause, which means that state courts may still decide for themselves when to apply the laws of other states just as they could under the Articles of Confederation.

D. Even in the Law of Slavery, the Clause Did Not Require States to Apply Each Others' Laws

The history of slavery law is striking evidence of the Clause's original meaning. Had it required states to apply the laws of other states, as California argues, slaves who moved into free states would have remained slaves. But that was not the case. *See, e.g.* Joseph Story, *A Familiar Exposition of The Constitution of The United States* § 411 (1840) ("[A]t the common law, a slave escaping into a State, where slavery is not allowed, would immediately become free, and could not then be reclaimed."). To avert this problem, the Fugitive Slave Clause, art. IV, § 2, cl. 3, was added. If the Full Faith and Credit Clause had required northern states to apply southern states' laws, the Fugitive Slave Clause would have been surplusage. But in fact, "legal argument concerning interstate comity and slavery did not invoke the full faith and credit clause . . . . In the 1780s 'it was almost axiomatic that the operation of "normal" . . . reciprocity would not lead to the recognition by one state of the slave property of another.'" Anthony J. Sebok, Note: *Judging the Fugitive Slave Acts*, 100 Yale L.J. 1835, 1847 n.68 (Apr. 1991) (citations omitted).

In fact, many antebellum courts held that slavery laws did not extend into nonslavery jurisdictions. Those courts often rejected the argument that the Full Faith and Credit Clause permitted slave states to extend their slavery laws over state borders. *See, e.g.*, *Harry v. Decker*, 1 Miss. 36 (1818); *Commonwealth v. Aves*, 35 Mass. 193, 216-18, 221 (1836); *In Re Booth*, 3 Wis. 1 (1854); *Anderson v. Poindexter*, 6 Ohio St.

622, 631 (1856) ("Kentucky can not, by the law of comity, demand of this state an abrogation of its constitution and municipal laws, to promote any of its own peculiar institutions . . . .").[3] These decisions doubtless had a "chilling effect" upon the policies of the slave states, *cf.* Pet. Br. at 35, but that did not, and does not, violate the Constitution.

Were California's interpretation correct, northern states would have been required to apply the laws of slave states. But such arguments were routinely rejected, because the Clause was understood to impose only an evidentiary rule on state courts, not a national conflict-of-laws rule. Just as northern courts did not have to apply southern slave laws, Nevada is not required to apply California law in this case.

E. The Full Faith and Credit Clause Was Not Interpreted to Require a Forum State to Apply Sister States' Laws until After the Civil War

In 1813, this Court held that while Congress had authority to require states to give conclusive effect to the judgments or statutes of other states, the Constitution itself did not impose such a requirement. *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 485 (1813). *Mills* addressed only the reach of the Full Faith and Credit *statutes*, not the Clause. *See id.* at 485; Nadelmann, *supra*, at 67.[4] Courts at the time understood that *Mills* did not

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[3] Indeed, even after *Dred Scott v. Sandford*, 19 How. (60 U.S.) 393 (1856), courts continued to hold that out-of-state slavery laws did not extend into nonslavery states. *See Lemmon v. People*, 20 N.Y. 562 (1860). The *Lemmon* court rejected the dissent's argument that the Clause required New York to apply the laws of slavery. *Compare id.* at 634 (Clerke, J., dissenting).

[4] Nadelmann notes that Justice Story later changed his mind. *See* Story, Commentaries § 1313. But Story wrote without the benefit of Madison's notes on the Philadelphia convention, and in any case, his later view was a minority view in conflict with binding precedent.

(continued...)

address the Clause. *See, e.g.*, *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 175-76 (1850); *Rathbone v. Terry*, 1 R.I. 73, 77 (1837), *Silver Lake Bank v. Harding*, 5 Ohio 545, 546-47 (1832); *Hoxie v. Wright*, 2 Vt. 263, 267 (1828); *Hampton v. M'Connel*, 16 U.S. (3 Wheat) 234, 235 n.3 (1818).

The question in one such case, *Draper's Executors v. Gorman*, 35 Va. 628 (1837), was whether the Clause, and the acts passed under it, required states to give conclusive effect to the decisions of Washington, D.C. courts, which are federal. The court held that the Clause did not require states to enforce judgments from federal jurisdictions, because if it did, "the limitations upon the power of congress, and the rights reserved to the states, [would be] idle and illusory." *Id.* at 632. If the Clause required states to give effect to all laws from other American jurisdictions,

> [the federal government] may establish a lottery in the district, and authorize a sale of its tickets in the states, contrary to their penal laws: or it may establish a bank there, and in aid of this corporation, extend its branches into every state of the union; which, for the sake of the argument, I assume it has no constitutional right to do under its general powers. Is it possible that such a construction can be given to this grant of powers, limited to the ten miles square? And if we yield to this construction, where are the rights reserved to the states?

Id. at 633. The case at bar involves the same problem: under California's interpretation of the Clause, California could

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[4] (...continued)
Moreover, Story was discussing only the applicability of judgments, not statutes, and he concluded that "[t]he constitution did not mean to confer a new power or jurisdiction; but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory." *Id.*

extend its laws into Nevada, and every other state, and this would infringe on the rights of the states to set their own policies.

In *Earthman's Administrators v. Jones*, 10 Tenn. 484 (1831), the Tennessee Supreme Court held that *Mills* did not require states to apply sister states' laws. "[H]as the legislature of Missouri power and jurisdiction," asked the court, "to pass laws, operating directly or indirectly upon the citizens of other states beyond her territorial limits?" *Id.* at 485. If the Clause did require such enforcement, then "the State of Missouri say[s] to the State of Tennessee . . . You must execute our laws upon your citizens, of whose persons we never have had jurisdiction . . . because the judgments of our courts, rendered in pursuance of our laws, do . . . that conclusively." *Id.* at 487.[5] Therefore, "[t]he legislature and courts of Missouri have no more jurisdiction to bind the citizens of Tennessee, not found in Missouri, than the authorities of Tobago had to bind the people of England." *Id.* at 488-89. Likewise, California has no power to write laws binding on the residents of Nevada, including Mr. Hyatt.

Mills and its progeny are consistent with *Federalist* 42: Congress has exclusive authority to declare the effect which one state's judgments and statutes will have in other states, but where Congress has not done so, states are "left precisely in the situation they were in under the articles of confederation," *Aicken*, 1 Cai. R. at 480—namely, they may decide on principles of comity, whether or not to apply the other states' law.

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[5] *Jones* noted that *Mills* had been misinterpreted by those who believed the Clause required extra-territorial enforcement of state laws. The court pointed out that Justice Story, who wrote *Mills*, had explained in another case that " 'no legislature can compel any persons beyond its own territory.' " *Id.* at 487 (quoting *Flower v. Parker*, 9 F. Cas. 323, 324 (C.C.D. Mass. 1823)).

It was not until *Chicago & Alton R.R. v. Wiggins Ferry Co.*, 119 U.S. 615 (1887), that this Court began interpreting the Clause to require states to apply the laws of other states. *Chicago & Alton* held that under *Mills*, the Clause "implies that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home." *Id.* at 622. But this was a misreading of *Mills*, since *Mills* addressed the statutes, not the Clause. Although this difference might seem minor, it has caused widespread misunderstanding of the actual import of Article IV section 1. This confusion has led to the notion that the Clause was meant to create a single, unified judiciary system. *See* Whitten, 32 Creighton L. Rev. at 344-45; Nadelmann, *supra*, at 74 (quoting Robert Jackson, *Full Faith And Credit: The Lawyer's Clause of The Constitution*, 45 Col. L. Rev. 1, 34 (1945)); *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 277 (1935). But as *Gorman* pointed out, such an interpretation would allow states to legislate for each other, rendering the sovereignty of the states meaningless, and making the Constitution of 1787 a wholly national document, instead of "a federal, and not a national, act." The Federalist No. 39, at 243 (James Madison) (C. Rossiter ed., 1961). *See also Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935) (noting "absurd" results if Clause requires one state to apply other state's laws regardless of its own policy). Not even Justice Story, or Chief Justice Marshall, who famously believed in expanding federal power, went this far.

Instead, as this Court explained in *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457 (1873):

> It has been supposed that . . . [the Clause] had the effect of rendering the judgments of each State equivalent to domestic judgments in every other State, or at least of giving to them in every other State the same effect, in all respects, which they have in the State where they are rendered. And the

> language of this court in *Mills v. Duryee*, seemed to give countenance to this idea . . . . [But] the Constitution "did not make the judgments of other State's domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them, as evidence."

Id. at 462-63 (quoting Joseph Story, *Commentary on the Conflict of Laws* § 609 (1834)).

Beginning in the early part of this century, courts followed the dictum in *Chicago & Alton* in holding that the Clause requires that states apply, rather than merely accept into evidence, the laws of other jurisdictions. *See, e.g.*, *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 155 (1932). This interpretation is contrary to the original meaning of the Clause, the sovereignty of the states, and over a century of American case law. *See* Nadelmann, *supra*, at 73-74. As one court noted, "the provision of the 4th article of the national constitution, which requires each state to 'give full faith and credit to the public acts, records, and judicial proceedings of the other states'. . . cannot have the effect of making the laws of one state the laws of another." *Ex Parte Kinney*, 14 F. Cas. 602, 607 (C.C.E.D. Va. 1879).

Reiterating the original understanding of the Clause would protect the Constitution's federalist design, protect the rights of states to set their policies, and give guidance to courts attempting to apply the Full Faith and Credit Clause.

III

REQUIRING NEVADA TO APPLY CALIFORNIA'S IMMUNITY STATUTE UNDER THE FULL FAITH AND CREDIT CLAUSE WOULD INFRINGE ON NEVADA'S SOVEREIGNTY

California's argument is inconsistent with both modern Full Faith and Credit cases and with the original meaning of the Clause, but it also would contradict sound policy, undermine state sovereignty, and lead to absurd results.

California asks this Court to allow California to "project its laws across state lines so as to preclude [Nevada] from prescribing for itself the legal consequences of acts within it," *Pacific Employers Insurance Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 504-05 (1939), whenever California's actions "involve a core, sovereign state function."

Even assuming *arguendo* that such a rule is appropriate in some cases, it would not be appropriate here. This case does not involve a "core, sovereign function," a "threat to our constitutional system of cooperative federalism," *Hall*, 440 U.S. at 424 n.24, or "any policy of hostility to the public Acts of [California]. [Nevada] is choosing to apply its own rule of law to give affirmative relief for an action arising within its borders." *Carroll v. Lanza*, 349 U.S. 408, 413 (1955). Nevada did not attempt to meddle in California tax policy. Instead, California's agents chose to travel to Nevada and allegedly commit torts there. Nevada's policies are legitimate, have been consistently applied, and ought to prevail within Nevada's borders.

However, California's proposed "effects rule" is not appropriate. Although allowing states to make their own policy decisions may inconvenience neighboring states which choose differently, that does not justify depriving states of the power to make such choices. States may pursue their own policies within the framework of the Constitution, even where they differ from

those of other states. This is the very definition of federalism. *FMC v. S.C. State Ports Auth.*, 535 U.S. 743 (2002); *New York v. United States*, 505 U.S. 144, 155-60 (1992); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

This Court has repeatedly held that states may set policies different from those of other states:

> The several States of the Union are not, it is true, in every respect independent . . . . But, except as restrained and limited by [the Constitution], they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them . . . . [E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . [N]o State can exercise direct jurisdiction and authority over persons or property without its territory. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others . . . . [T]he laws of one State have no operation outside of its territory, except so far as is allowed by comity . . . .

Pennoyer v. Neff, 5 Otto (95 U.S.) 714, 722 (1877). *See also Bradford Electric Light Co. v. Clapper*, 286 U.S. at 163-64 (Stone, J., concurring) ("I should hesitate to say that the Constitution projects the authority of the Vermont statute across state lines into New Hampshire, so that the New Hampshire courts, in fixing the liability . . . for a tortious act committed within the state, are compelled to apply Vermont law instead of their own.").

Nor is there any exception to this rule when a case "involves" a state's "sovereign functions." In *Bonaparte v. Tax Court*, 104 U.S. 592 (1881), this Court rejected the argument that the Clause required one state to apply another state's tax exemptions. "No state can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in [tax policy] . . . ." *Id.* at 594. The Court saw that interpreting the Clause to require states to apply the laws of other states threatens state sovereignty, even where the case involves the state's "sovereign function"of tax policy. "States are left free to extend the comity which is sought, or not, as they please." *Id.* at 595.

Although couched in language suggesting that it supports state sovereignty, California's "effects rule" actually undermines it. The Constitution leaves states free to adopt different policies, and it is precisely to protect the policy-making powers of the states that this Court has repeatedly held that the Clause "does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" *Baker by Thomas v. General Motors*, 522 U.S. 222, 232 (1998) (quoting *Pacific Employers Insurance Co. v. Industrial Accident Comm'n*, 306 U.S. 493 at 501 (1939)). Nevada's sovereignty would be curtailed by allowing federal courts to determine whether or not to permit Nevada to prosecute torts occurring within its boundaries. To require that California immunities extend to Nevada courts in contravention of Nevada's policy, would make Nevada a "vassal" to California, restricting the remedies available to Mr. Hyatt and other Nevada residents. *See Lanza*, 349 U.S. at 412. Should a case arise justifying such a requirement, the Clause gives Congress exclusive authority to impose it.

California's proposed rule is also impermissibly vague. California argues that the Clause should require the application of another state's law "[w]hen the *subject* of the litigation is the state's *activities* in carrying out its core government functions." Pet. Br. at 19. California was not engaged in the actual collection of taxes, but in an investigation in support of tax collection. According to California's proposed rule, any "legislatively immunized activities undertaken in carrying out the State's core government functions," *id.*, would necessarily be covered, unless federal courts have authority to draw a line between actions which are, and which are not, "incidental" to "critical sovereign responsibilities." *Id.* at 11. Such line-drawing would necessarily involve policy determinations which might run counter to policy determinations by the states. California asks this Court whether "the judicial authority of one State with respect to the governmental actions of another State be tempered by [Federal Courts]." Pet. Reply Brief in Support of Writ of Certiorari at 6. But, with respect, the Clause vests *Congress alone* with the authority to determine the effects of one state's public acts in other states, and neither it, nor current case law, justifies federal courts in making these decisions.

Where the state's highest court has determined that the state has a legitimate interest in applying its own law, the *Allstate* test is satisfied, and where the tort in question occurred within Nevada's borders, any possible exception which footnote 24 of *Hall* may have carved out of *Allstate*, is inapplicable.

California's theory is also self-contradictory, in that it actually undermines sovereignty. According to California, the Clause requires Nevada to defer to California to such a degree as to undermine Nevada's own sovereign interest in protecting its residents. Yet

> [i]t is difficult to perceive how [California] could be said to have an interest in Nevada's domiciliaries superior to the interest of Nevada. Nor is there any

> authority which lends support to the view that the full faith and credit clause compels the courts of one state to subordinate the local policy of that state, as respects its domiciliaries, to the statutes of any other state.

Williams v. North Carolina, 317 U.S. 287, 296 (1942). *See also Allstate*, 449 U.S. at 323 (Stevens, J., concurring) ("[I]n view of the fact that the forum State is also a sovereign in its own right, in appropriate cases it may attach paramount importance to its own legitimate interests.").

Presumably, California's theory would also work the other way, requiring California to defer to Nevada's sovereignty despite California's sovereign interests (*contra Hall*). California would have to obey the discovery orders in this case because they are "incidental" to Nevada's "core sovereign function" of protecting Mr. Hyatt from torts. But this "would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." *Alaska Packers*, 294 U.S. at 547. It was precisely to avoid such a paradox that this Court delineated the "public policy exception" in its Full Faith and Credit cases.

Finally, California's proposed rule leaves people like Mr. Hyatt without either a legal *or a political* remedy. Courts often defer to the acts of administrative agencies on the grounds that those who disagree with agency policies can change them through political action. But residents of Nevada have no say in the elections of California. Were California to prevail here, Nevada residents would have no remedy, at either the bar or the ballot box, for torts such as those alleged. This would render bureaucracies unaccountable, and Nevada unable to protect its residents. These policy considerations, plus the original meaning of the Clause, demonstrate that California's argument must fail.

CONCLUSION

California proposes an "effects rule," under which the Full Faith And Credit Clause would require a forum state to apply the law of a sister state when failing to do so would "interfere with the sister state's capacity to fulfill its own core sovereign responsibilities." This rule is contrary to the original meaning of the Clause, and infringes on the sovereignty of forum states. The judgment of the Supreme Court of Nevada should be *affirmed*.

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Respectfully submitted,

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